(d) No default may be entered against the defendant before expiration of his or her time to plead, and no motion under this section, or under Section 473 or 473.5 when joined with a motion under this section, or application to the court or stipulation of the parties for an extension of the time to plead, shall be deemed a general appearance by the defendant.

(e) A defendant or cross-defendant may make a motion under this section and simultaneously answer, demur, or move to strike the complaint or cross-complaint.

(1) Notwithstanding Section 1014, no act by a party who makes a motion under this section, including filing an answer, demurrer, or motion to strike constitutes an appearance, unless the court denies the motion made under this section. If the court denies the motion made under this section, the defendant or cross-defendant is not deemed to have generally appeared until entry of the order denying the motion.

(2) If the motion made under this section is denied and the defendant or cross-defendant petitions for a writ of mandate pursuant to subdivision (c), the defendant or cross-defendant is not deemed to have generally appeared until the proceedings on the writ petition have finally concluded.

(3) Failure to make a motion under this section at the time of filing a demurrer or motion to strike constitutes a waiver of the issues of lack of personal jurisdiction, inadequacy of process, inadequacy of service of process, inconvenient forum, and delay in prosecution.

STATEMENT OF THE CASE

A. Background

In this case, Comerica Bank, a Michigan corporation seeks to recover repayment of certain loans it made to several of the defendants as part of the co-financing for the production of seven feature films (the "Films"). The Films were produced in Canada or co-produced in Canada and the United Kingdom by Canadian corporations and were to be distributed in foreign countries.

Petitioners are challenging California's exercise of personal jurisdiction over them as they do not have a presence in California for purposes of general personal jurisdiction and were not parties to, or guarantors of the loans for purposes of specific jurisdiction.

California purports to exercise personal jurisdiction over the Petitioners based solely on imputed conduct consisting of conclusory allegations of alter ego and conspiracy.

1. Real Party In Interest

Real Party in interest is Comerica Bank, a Michigan banking corporation.

Comerica Bank has maintained an active presence in Canada since 1996, with its Canadian Headquarters located in Toronto, Ontario, Canada. Comerica Bank provides a wide range of corporate banking services to Canadian companies and subsidiaries of U.S. companies carrying on business in Canada. See, www.comerica.com: North American Services.

Comerica Bank-Canada was a foreign bank subsidiary of Comerica Bank listed on Schedule II of the Bank Act (Canada) (the "Canadian Bank Act"). See, Order of the Ontario Securities Commission, In the Matter of Commodity Futures Act R.S.O. 1990 Chapter S. 20 as Amended and In the Matter of Comerica Bank dated, August 17, 2001. Pursuant to amendments made to the Canadian Bank Act in 1999, Comerica Bank-Canada applied to become a Schedule III foreign bank subsidiary under the Canadian Bank Act authorized to carry on banking activities through branches in Canada. On October 1, 2001, Comerica Bank-Canada transferred its assets to, and had its deposit liabilities assumed by a newly established Canadian branch of its parent, Comerica Bank, and Comerica Bank-Canada ceased accepting deposits. See, Announcement of the Canadian Deposit Insurance Company dated January 8, 2002. Comerica Bank now operates as a foreign bank subsidiary in Canada in accordance with the Canadian Bank Act.

Through its Comerica Entertainment Group, Comerica Bank touts itself as a leader in international entertainment industry lending. See, www.comerica.com-entertainment. Comerica Entertainment Group asserts that it has built a strong presence outside the United States, supporting entertainment communities in Europe, Canada and the Pacific Rim. Comerica Bank affiliates span the globe and include Independent Film Financing Inc. in Canada and Australia, Benfield Imperial Entertainment Finance in the United Kingdom, Media Entertainment Funding GmbH in Germany and Asia Entertainment Finance Associates in Asia. Comerica's affiliate offices assist domestic and international clients such as independent film producers and foreign and

domestic sales agents with co-production, interim and gap financing for film and television projects abroad. See, www.iff.ca. Comerica's affiliate, Independent Film Financing, Inc., is the exclusive Canadian representative of Comerica Entertainment Group in Canada, and is headquartered in Toronto, Ontario. *Id.*

Comerica Bank provided a portion of the financing for the production of the Canadian Films at issue. The balance of the financing was to be provided by third parties including foreign distributors. The Comerica loan obligations were secured by the Films and all the proceeds and revenue to be derived from the Films.

2. Contracting Defendants

The "Contracting Defendants" are special purpose entities incorporated in Canada that were set up at the behest of Comerica Bank as conditions precedent to its funding of the loans. They are defendants: Janus Productions, Inc., GFT-Going Back Films, Inc., GFT/Redwood KOTN Films, Inc., GFT Heresy Films, Inc., GFT Circle Films, Inc., GFT Road Rage Films, Inc. and GFT/Redwood Ignition Films Inc.

The Contracting Defendants are the named borrowers on all the Comerica Bank loans at issue. The Contracting Defendants are the parties to the loan agreements, security agreements, interparty agreements, distribution agreements, assignments and various other documents that Comerica Bank required to be executed before funding the loans.

The establishment of such special purpose entities is customary in the film industry. They are created to meet

specific lending requirements to hold the rights to each individual Film in order to establish a single entity that controls the rights to the film, including the copyright, and to facilitate assignments and conveyances of the film rights and to enable the film production company to establish bank accounts and to receive and disburse funds. In the event of a shortfall, the rights held by the special purpose entity is the collateral upon which Comerica Bank can foreclose. The loan documents provide for jurisdiction and venue over the special purpose entities in California.

3. Petitioners

Comerica has also named Petitioner Gary Howsam ("Howsam"), a Canadian national and Petitioner Greenlight Film & Television Inc. ("GFTI") an Ontario, Canada corporation with its principal place of business in Toronto, Ontario, as defendants. Howsam is the President of GFTI. App. at p. 108: Howsam Decl., ¶ 2.

Although Howsam is an officer of the special purpose entities, it is undisputed that neither Howsam individually, nor GFTI, ever entered into any written agreement with Comerica Bank. App. at p. 109: Howsam Decl., ¶ 10. Comerica Bank did not require Howsam, individually, or GFTI, to sign as parties to any loan document, security agreement, interparty agreement, distribution agreement, assignment or any other agreement of any kind. Nor did Comerica require Howsam individually, or GFTI, to sign personal guarantees or any other security agreement or document evidencing their personal responsibility for repayment of the loans. Neither Howsam nor GFTI ever consented expressly or impliedly in any way to personal jurisdiction in California as a condition precedent to

Comerica Bank funding any of the loans. GFTI is not and has never been qualified to do business in the State of California. None of GFTI's officers or directors, including Howsam, resides or is domiciled in the State of California. GFTI has no employees residing or domiciled in California. GFTI has no branch office or comparable facilities in California, and has no telephone listings or mailing addresses in California. No meetings of GFTI's board of directors or shareholders have been held in California and none of its officers or directors has attended business conferences in such capacities within the State of California. Neither GFTI nor Howsam maintain any bank accounts or other tangible personal or real property in the State of California. GFTI does not direct any of its advertising specifically toward California residents nor does it advertise in publications that are directed primarily toward California residents. All of the books and records of GFTI and Howsam are located in Toronto, Ontario, Canada. App. at pp. 108-09: Howsam Decl., ¶¶ 3-10.

4. Comerica's Allegations of Fraud

At issue in this case is whether certain minimum guarantee agreements provided from foreign distributors in Italy, France, Germany, Greece, Mexico, Brazil and other foreign countries to Comerica Bank through a sales agent were forged or fraudulent. Comerica Bank contends that obtaining these minimum guarantee agreements from these foreign distributors were conditions precedent to Comerica's funding the loans.

Comerica Bank alleges that the special purpose entities entered into a Sales Agent Agreement with third party Hilltop Entertainment LLC that employed defendant

Glocker. Hilltop Entertainment LLC is in bankruptcy, so Comerica contends that Glocker, individually, conspired with *Comerica Bank's own employee Bennecke* and Howsam to submit to Comerica fraudulent minimum guarantee agreements from the foreign distributors to obtain the Comerica loans.

However, it is undisputed that neither Howsam nor anyone acting on GFTI's behalf actually submitted the allegedly fraudulent foreign distributor minimum guarantee agreements at issue to Comerica Bank. Thus, Comerica seeks to assert personal jurisdiction over Petitioners based solely on imputed conduct consisting of conclusory allegations of alter ego and conspiracy.

B. Proceedings in the California Courts

On October 27, 2004, Howsam and GFTI specially appeared in the underlying action and moved to quash service of summons for lack of personal jurisdiction and forum non conveniens. A federal jurisdictional issue was raised because a state court's assertion of personal jurisdiction over a nonresident defendant who has not been served with process within the state must comport with the requirements of the due process clause of the federal Constitution, citing among others, *Burger King v. Rudzewicz*, 471 U.S. 462 [85 L. Ed. 2d 528, 540, 105 S. Ct. 2174] (1985) and *Vons Companies, Inc. v. Seabest Foods, Inc.*, 14 Cal. 4th 434, 444-45 [58 Cal. Rptr. 2d 899, 926 P.2d 1085] (1996) (*Vons*). App. at pp. 74-75: Motion to quash.

On December 15, the trial court heard the motion to quash filed by Howsam and GFTI and took it under submission. App. at pp. 81-106: Reporter's Transcript. Later that day, the trial court issued its minute order.

App. at pp. 5-10. *The Superior Court sustained objections to Comerica's conclusory allegations of conspiracy as speculation and lacking any foundation as against Petitioners.* App. at p. 8: minute order. Nevertheless, the trial court denied Petitioners' motion to quash finding that the allegations were insufficient to establish general jurisdiction, but found "specific" jurisdiction based upon imputed conduct under an alter ego theory. App. at pp. 6-7.

Petitioners timely filed a Petition For Writ of Mandate, Prohibition or Other Appropriate Relief with the Second District Court of Appeal of California from the denial of their motion to quash on January 6, 2005. App. at pp. 27-64. The federal issue was raised by Petitioners' argument: "Where as here, personal jurisdiction 'is challenged by a non-resident (in this case foreign) defendant(s), the burden of proof is upon the Plaintiff to demonstrate that 'minimum contacts' exist between defendant and the forum state to justify imposition of personal jurisdiction.'" App. at p. 47: Writ of mandate. The Court of Appeal denied the requested relief on April 14, 2005 in a two-line Order. App. at p. 3.

Petitioners then filed a petition for review with the California Supreme Court. App. at pp. 11-26. The petition for review raised the issues of personal jurisdiction and minimum contacts citing *Sonora Diamond Corp. v. Superior Court*, 83 Cal. App. 4th 523, 535 [99 Cal. Rptr. 2d 824] (2000) which acknowledges that Code of Civil Procedure Section 410.10 permits California courts to exercise jurisdiction on any basis not inconsistent with state or federal constitutional principles, and noting that the federal constitutional principles governing jurisdiction are represented by the legal shorthand references *minimum*

contacts, International Shoe, and *World-Wide Volkswagen* which are familiar to every law student. See, App. at p. 17. The California Supreme Court denied review of Petitioners' petition. App. at p. 1.

STATEMENT OF REASONS FOR GRANTING THE WRIT

The Court should grant this petition for certiorari because it raises unique issues of international sovereignty, comity, jurisdiction and conflict of laws between the United States and Canada. Moreover, the notion of excising specific jurisdiction based solely on imputed conduct eviscerates the jurisdictional concept of fair warning which is intended to give "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 [62 L. Ed. 2d 490, 100 S. C 559] (1980).

A. Summary of Argument

Minimum contacts exist where the defendant's conduct in the forum state is such that he should reasonably anticipate being subject to suit there, and it is reasonable and fair to force him to do so. Contractual arrangements between international parties concerning issues of personal jurisdiction should be respected absent a compelling reason to disregard them. By requiring that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," [*Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring

in judgment)], the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297.

World-Wide Volkswagen's concept of fair warning is particularly applicable to disputes involving foreign nationals. This Court has long recognized the unique and substantial burdens placed upon foreign nationals defending themselves in a foreign country. This Court has held that such circumstances should carry significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders. In every case of an international defendant, the procedural and substantive interests of other nations in a state court's assertion of jurisdiction, as well as the "Federal interests in Government's foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. 'Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.'" *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 115 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987); quoting *United States v. First National City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting).

Moreover, the sole basis for jurisdiction in California emanates from the jurisdiction and venue provisions included in the bank's loan and security agreements, *but Petitioners are not parties to any of those agreements.*

Specific jurisdiction here is being asserted based solely on imputed conduct, even though Petitioners purposefully structured their transactions with Comerica to do business in Canada, not subject themselves to personal jurisdiction in California. There was no fraud involved with Petitioners' use of their corporate structure here, as Comerica was fully aware of the relationships between the Petitioners and the Contracting Defendants at the time the loans were funded. Comerica could have demanded that Petitioners consent to personal jurisdiction in California as a condition to funding the loans, or demanded that Petitioners provide personal guarantees for repayment of the loans, but Comerica failed to obtain such agreements from Petitioners. Under such circumstances, it would be unreasonable to subject Petitioners to jurisdiction in California based solely upon a theory of alter ego. The imposition of liability through alter ego should be used sparingly based upon equitable considerations to prevent fraud and injustice caused by abuses of the corporate form. It should not be imposed simply as a substitute for Comerica's failure to obtain personal guarantees from the Petitioners by contract.

Given the weakness of Comerica's potential contract remedies against Petitioners, Comerica alleges an elaborate tort theory of conspiracy to defraud involving the Petitioners and the bank's *own employee* as justification to impose personal jurisdiction (and personal liability in tort) over Petitioners. *The Superior Court, however, sustained objections to Comerica's conspiracy allegations as being based on speculation and lacking any foundation.* App. at p. 8: minute order. Moreover, California law does not recognize allegations of conspiracy as a basis for acquiring personal jurisdiction over a party. Personal jurisdiction

over any nonresident defendant must be premised upon forum-related acts personally committed by the individual. Imputed conduct is a connection too tenuous to warrant the exercise of personal jurisdiction. *Edmunds v. Superior Court*, 24 Cal. App. 4th 221, 233 [29 Cal. Rptr. 2d 281] (1994); see also, *Mansour v. Superior Court* (1995), 38 Cal. App. 4th 1750, 1758 [46 Cal. Rptr. 2d 191]; *Kaiser Aetna v. Deal*, 86 Cal. App. 3d 896, 901 [150 Cal. Rptr. 615] (1978).

Even assuming Comerica met its burden of showing Petitioners' minimum contacts with California, subjecting Petitioners to suit in California would be unreasonable and would offend traditional notions of fair play and substantial justice. Comerica's contacts with Canada are far more substantial than any contacts Petitioners may have with California. Comerica is a Michigan bank with a chartered subsidiary bank in Canada which is subject to Canadian regulatory banking laws. It has Canadian headquarters in Toronto, and has purposefully injected itself into the international film production and financing industry based in Toronto, an industry in which the Canadian government has a substantial interest. The transactions here involve films produced in Canada and the UK for primarily international distribution. The allegations of fraud at issue against Petitioners, if they occurred at all, occurred in Canada and involve foreign nationals and foreign distribution rights in the UK, Italy, France, Germany, Greece, Mexico, Brazil and other foreign countries.

In sum, Comerica could have required that Petitioners submit to jurisdiction in California as a condition precedent to funding the loans, but did not do so. To assert jurisdiction over a foreign national and foreign corporation that has purposefully sought to do business in Canada and

not the forum of California based solely upon imputed conduct violates traditional notions of fair play and substantial justice.

B. Imputed Conduct is a Connection Too Tenuous to Warrant the Exercise of Specific Personal Jurisdiction over an International Party and International Corporation that Purposefully Structured its Transactions to Do Business in Canada with Plaintiff and to Avoid Subjecting Themselves to Jurisdiction in California

California's long-arm statute authorizes California courts to exercise jurisdiction on any basis not inconsistent with the Constitution of the United States or the Constitution of California. Cal. Code Civ. Proc. § 410.10; *Vons*, 14 Cal. 4th at 444-45.

"The Due Process Clause of the Fourteenth Amendment operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of nonresident defendants." *Shaffer v. Heitner*, 433 U.S. 186, 198-200 (1977).

A state court's assertion of personal jurisdiction over a nonresident defendant who has not been served with process within the state comports with the requirements of the Due Process clause of the federal Constitution if the defendant has such minimum contacts with the state that the assertion of jurisdiction does not violate "'traditional notions of fair play and substantial justice.'" *Vons*, 14 Cal. 4th at 444-45, citing *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945).

Minimum contacts exist where the defendant's conduct in the forum state is such that he should reasonably anticipate being subject to suit there, and it is reasonable and fair to force him to do so. *World-Wide Volkswagen*, 444 U.S. at 297. By requiring that individuals have "fair warning" that a particular activity may subject them to the jurisdiction of a foreign sovereign, the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297.

World-Wide Volkswagen's concept of fair warning is particularly applicable to disputes involving foreign nationals. This Court has long recognized the unique and substantial burdens placed upon foreign nationals defending themselves in a foreign country. This Court has held that such circumstances should carry significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders. In every case of an international defendant, the procedural and substantive interests of other nations in a state court's assertion of jurisdiction, as well as "the Federal interests in Government's foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. 'Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.' *United States v. First National City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)." *Asahi Metal*, 480 U.S. at 115.

Nevertheless, a nonresident defendant may be subject to the general jurisdiction of the forum if his or her contacts in the forum state are "substantial . . . continuous and systematic." *Perkins v. Benguet Mining Co.*, 342 U.S. 437, 445-446 [96 L. Ed. 485, 492, 493, 72 S. Ct. 413] (1952); see also, *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414-415 [80 L. Ed. 2d 404, 410-411, 104 S. Ct. 1868] (1984). In such a case, "it is not necessary that the specific cause of action alleged be connected with the defendant's business relationship to the forum." *Helicopteros*, 466 U.S. at 414. Such a defendant's contacts with the forum are so wide-ranging that they take the place of physical presence in the forum as a basis for jurisdiction. *Burnham v. Superior Court*, 495 U.S. 604, 618-619 [109 L. Ed. 2d 631, 644-645, 110 S. Ct. 2105] (1990) (plur. opn. by Scalia, J.)

Here, the Superior Court found that Petitioners' contacts with California were not sufficiently substantial or systematic to establish general jurisdiction. See, App. at pp. 6-7. Hence, Comerica Bank has to establish specific jurisdiction over Petitioners.

"Specific jurisdiction" is jurisdiction which arises when a defendant's contacts with the forum state are the activities giving rise to the litigation. *Burger King*, 471 U.S. at 477-478. "When determining whether specific jurisdiction exists, courts consider the 'relationship among the defendant, the forum, and the litigation.'" *Helicopteros*, 466 U.S. at 414, quoting *Shaffer*, 433 U.S. at 204.

This Court has described the forum contacts necessary to establish specific jurisdiction as involving variously a nonresident who has "purposefully directed" his or her activities at forum residents [*Burger King*, 471 U.S. at

471-472], or who has "purposefully derived benefit" from forum activities (*Id.* at p. 473), or "purposefully avail[ed himself or herself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at p. 475. The Court also has referred to the requisite forum contact as involving a nonresident defendant who "'deliberately' has engaged in significant activities with a State [citation] or has created 'continuing obligations' between himself and residents of the forum [citation]" (*Id.* at 475-476), concluding that in such cases the defendant "manifestly has availed himself of the privilege of conducting business [in the forum], and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." *Id.* at p. 476.

California and the Ninth Circuit hold that a court may exercise specific jurisdiction over a nonresident defendant only if: (1) the defendant has purposefully availed himself or herself of forum benefits (*Vons*, supra, 14 Cal. 4th at p. 446); (2) the controversy is related to or arises out of the defendant's contacts with the forum (*Id.*, quoting *Helicopteros*, 466 U.S. at p. 414); and (3) the assertion of personal jurisdiction would comport with fair play and substantial justice (*Vons*, 14 Cal. 4th at p. 447, quoting *Burger King*, 471 U.S. at 472-473; see, *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000); *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1485 (9th Cir. 1993).

The requirement of purposeful availment "ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts or of *the unilateral activity of another party or third person.*"

McGlinchy v. Shell Chemical Co., 845 F.2d 802, 816 n. 9 (9th Cir. 1988). A defendant must, by his *own actions*, create a "substantial connection" to the forum state. *Burger King*, 471 U.S. at 475.

Here, Petitioners were not parties to the loan agreements and other contracts at issue.[1] They are being haled into a California court based solely on imputed conduct, even though Petitioners purposefully structured their transactions with Comerica to avoid subjecting themselves to personal jurisdiction in California. Allegations of imputed conduct are simply insufficient to establish specific jurisdiction over a foreign defendant in such circumstances.

Under California law, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations. *Communist Party v. 522 Valencia, Inc.*, 35 Cal. App. 4th 980, 993 [41 Cal. Rptr. 2d 618] (1995); *Robbins v. Blecher*, 52 Cal. App. 4th 886, 892 [60 Cal. Rptr. 2d 815] (1997).

Under California law, a corporate identity may be disregarded – the "corporate veil" pierced – only where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation. *Roman Catholic Archbishop v. Superior Court*, 15 Cal. App. 3d 405, 411 [93 Cal. Rptr. 338] (1971).

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[1] Indeed, even a contract between an out-of-state party and a resident of the forum state cannot, standing alone, establish sufficient minimum contacts with the forum under *Burger King*, 471 U.S. at 473.

In California, two conditions must be met before the alter ego doctrine will be invoked.[3] First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone. *Automotriz etc. De California v. Resnick*, 47 Cal. 2d 792, 796 [306 P.2d 1, 63 A.L.R.2d 1042] (1957); *Hennessey's Tavern, Inc. v. American Air Filter Co.*, 204 Cal. App. 3d 1351, 1358 [251 Cal. Rptr. 859] (1988).

Here, there was no fraud involved with Petitioners' use of their corporate structure, as Comerica itself required that the special purpose entities be formed and was fully aware of the relationships between the Petitioners and the Contracting Defendants at the time the loans were funded. Comerica could have demanded that Petitioners consent to personal jurisdiction in California as a condition to funding the loans, or demanded that Petitioners provide personal guarantees for repayment of the loans, but Comerica failed to obtain such standard agreements from Petitioners.

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[3] Of note, California legal standards for piercing the corporate veil would not even apply here. Generally speaking, only the laws of the jurisdiction of incorporation of a foreign corporation shall govern the liability, if any, of shareholders of the foreign corporation for the debts, liabilities, and obligations of the foreign corporation for which they are not otherwise liable by statute or agreement. For example, under the Ontario Business Corporations Act, R.S.O. 1990, Chapter B. 16: "The shareholders of a corporation are not, as shareholders, liable for any act, default, obligation or liability of the corporation except under subsection 34(5), subsection 108 (5) and section 243. R.S.O. 1990, c. B. 16, s. 92(1)."

The imposition of liability through alter ego should be used sparingly based upon equitable considerations to prevent fraud and injustice caused by abuses of the corporate form. It should not be imposed simply as a substitute for Comerica's failure to obtain personal guarantees from the Petitioners by contract.

Here, it is not inequitable to respect the corporate separateness of Petitioners. Indeed, it would be unreasonable to subject Petitioners to jurisdiction in California based solely upon a theory of alter ego given Comerica's knowledge of Petitioners' corporate structure and its own requirements in the loan documents to the creation of the separate special purpose entities.

Given the weakness of Comerica's potential contract remedies against Petitioners, Comerica alleges a tort theory of conspiracy to defraud involving the Petitioners and *the bank's own employee* as justification to impose personal jurisdiction (and personal liability in tort) over Petitioners. *The Superior Court, however, sustained objections to Comerica's conspiracy allegations as being based on speculation and lacking any foundation.* App. at p. 8: minute order.

Moreover, California law does not recognize allegations of conspiracy as a basis for acquiring personal jurisdiction over a party. Personal jurisdiction over any nonresident defendant must be premised upon forum-related acts personally committed by the individual. Imputed conduct is a connection too tenuous to warrant the exercise of personal jurisdiction. *Edmunds v. Superior Court*, 24 Cal. App. 4th 221, 233 [29 Cal. Rptr. 2d 281] (1994); see also, *Mansour v. Superior Court*, 38 Cal. App. 4th 1750, 1758 [46 Cal. Rptr. 2d 191] (1995); *Kaiser*

Aetna v. Deal, 86 Cal. App. 3d 896, 901 [150 Cal. Rptr. 615] (1978).

Comerica has not alleged sufficient minimum contacts to impose personal jurisdiction over the Petitioners in California. It is not reasonable for California to exercise personal jurisdiction over a foreign national and foreign corporation that have purposefully structured their transactions to avoid the jurisdiction of the forum state based solely upon allegations of imputed conduct, especially when it was within Comerica's power to require Petitioners to agree to submit to jurisdiction in California or guarantee the loans at issue, but it failed to do so.

C. Even if the Court Concludes that Comerica has Established Minimum Contacts over Petitioners, it Would be Unreasonable for California to Exercise Jurisdiction over the Petitioners

This Court has bifurcated the Due Process determination into two inquiries, requiring, first, that the defendant have the requisite contacts with the forum state to render it subject to the forum's jurisdiction, and second, that the assertion of jurisdiction be reasonable. See, *Asahi Metal*, 480 U.S. 102 at 113.

So, even assuming Comerica met its burden of showing Petitioners' minimum contacts with California, it must be determined whether subjecting Petitioners to suit in California would be reasonable and not offend traditional notions of fair play and substantial justice.

From this Court's opinions in *Burger King*, 471 U.S. at 477 and *Asahi Metal*, 480 U.S. 102 at 113, the Circuits have developed various lists of nonexclusive factors to be

balanced in determining reasonableness in a specific jurisdiction context.

The Ninth Circuit considers (1) the extent of the defendant's "purposeful interjection" into the forum state's affairs, (2) the burden on the defendant, (3) the extent of conflict with the sovereignty of the defendant's state, (4) the forum state's interest in adjudicating the dispute, (5) the most efficient judicial resolution of the controversy, (6) the importance of the forum to plaintiff's interest in convenient and effective relief, and (7) the existence of an alternate forum. *Core-Vent*, 11 F.3d at 1487; see also, *Benton v. Cameco Corp.*, 375 F.3d 1070, 1078-80 (10th Cir. 2004) ("[T]he reasonableness prong of the due process inquiry evokes a sliding scale: the weaker the plaintiff's [minimum contacts], the less a defendant need show in terms of unreasonableness to defeat jurisdiction," and finding the exercise of jurisdiction unreasonable: action impacted Canadian sovereignty as it involved a Canadian corporation with no offices or agents in Colorado, Canadian law would govern the dispute, the documents and witnesses were located primarily in Canada, and litigating in Canada would cause no undue hardship on plaintiff).

1. The Extent of the Defendant's "Purposeful Interjection" into the Forum State's Affairs

As noted, the weaker the plaintiff's minimum contacts with the forum state, the less a defendant need show in terms of unreasonableness to defeat jurisdiction.

Here, a foreign national and foreign corporation have purposefully structured their transactions with Comerica to do business in Canada not the jurisdiction of the forum

of California. The contractual arrangements, or lack thereof, between these international parties concerning issues of personal jurisdiction should be respected absent a compelling reason to disregard them. Here, California purports to exercise personal jurisdiction based solely upon allegations of imputed conduct, but imputed conduct is a connection too tenuous to warrant the exercise of personal jurisdiction, especially when it was within Comerica's power to require Petitioners to agree to submit to jurisdiction in California or guarantee the loans at issue, but it failed to do so. This factor weighs heavily in Petitioners' favor.

2. The Burden on the Defendant

Where, as here, Petitioners are from a foreign nation rather than another state, the sovereignty barrier is high and undermines the reasonableness of personal jurisdiction. *Pacific Atl. Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1330 (9th Cir. 1985). This Court has long recognized the unique and substantial burdens placed upon foreign nationals defending themselves in a foreign country. *Asahi Metal Indus.*, 480 U.S. at 114-115. As recognized in *Rocke v. Canadian Auto. Sport Club*, 660 F.2d 395, 399 (9th Cir. 1981), "[although] modern transportation had indeed reduced some of the burden of litigation in a faraway forum," the Canadian defendant organizations "nonetheless face a significantly greater burden defending [an] action in California than in [Canada]," particularly where the alleged acts giving rise to the claim occurred in Canada and most of the discovery would be centered in Canada. The same considerations apply here.

3. The Extent of Conflict with the Sovereignty of the Defendant's State

Here, potential conflicts with Canadian sovereignty are particularly severe because the adjudication of Comerica's alter ego and conspiracy claims will require an analysis and application of Canada's corporation laws in a California court. Moreover, Comerica's contacts with Canada are far more substantial than any contacts Petitioners may have with California. Comerica is a Michigan bank with a chartered subsidiary bank in Canada which is subject to Canadian regulatory banking laws. It has Canadian headquarters in Toronto, and has purposefully injected itself into the international film production and financing industry based in Toronto, an industry in which the Canadian government has a substantial interest. The transactions here involve films produced in Canada and the UK that were slated for international distribution. The allegations of fraud at issue against Petitioners, if they occurred at all, occurred in Canada and involve foreign nationals and foreign distribution rights in the UK, Italy, France, Germany, Greece, Mexico, Brazil and other foreign countries.

4. The Forum State's Interest in Adjudicating the Dispute

Nothing prevents Comerica from moving forward in California pursuant to the jurisdiction and venue clauses set forth in the agreements between Comerica and the Contracting Parties. Comerica is free to assert any and all rights and remedies Comerica provided for itself in the loan documents and security agreements.

At issue here is whether California has a special interest in protecting a Michigan bank in piercing the corporate veil of a Canadian corporation. It has been held that "California has no special interest in regulating banks that are not chartered under California law." *Paccar Int'l, Inc. v. Commercial Bank of Kuwait, S.A.K.*, 757 F.2d 1058, 1065 (9th Cir. 1985). On the other hand, Canada has a strong interest in adjudicating its own laws in actions involving Canadian corporations.

5. The Most Efficient Judicial Resolution of the Controversy

The forum that can most efficiently resolve these controversies is in Ontario, Canada. The vast majority of the parties are non-California parties with all but two of the tangential Defendants either domiciled or residing in Canada. All of Petitioners' documents relevant to Comerica's allegations of fraud are within the jurisdiction of Ontario, Canada, and it would be burdensome and inconvenient for the majority of the witnesses to attend a trial in California because of the expense of travel away from their business and other pursuits. Petitioners presented evidence in the Superior Court that it would not be possible to subpoena (at least twenty (20)) third party witnesses based in Canada for trial in California; while they are subject to process in Ontario. See, App. at pp. 108-113: Howsam Declaration.

Comerica, on the other hand, has a Canadian subsidiary bank headquartered in Toronto that is deeply involved and intimately knowledgeable of the Canadian film industry which is the subject of this litigation.

6. The Importance of the Forum to Plaintiff's Interest in Convenient and Effective Relief, and the Existence of an Alternate Forum

As noted, Ontario Canada is an acceptable alternative forum and given the presence of Comerica's subsidiary bank in Toronto, Comerica will not suffer any genuine harm or even any great inconvenience by adjudicating this case in Ontario. To the extent that Canadian law should apply to Comerica's alter ego and piercing the corporate veil claims, it would be in all the parties' best interests to adjudicate the claims in an Ontario court that is familiar with the Canadian corporation laws governing this case.

CONCLUSION

Weighing all the factors, California's assertion of personal jurisdiction over Petitioners is neither fair nor reasonable and would not comport with the requirements of the Due Process clause of the federal Constitution. Petitioners do not maintain an ongoing or continuous relationship with California and have not purposefully injected themselves into the forum state's affairs. To the contrary, Petitioners have structured their transactions with Comerica to do business in Canada, not the jurisdiction of California. Petitioners are not parties to any agreements with Comerica, they are not personal guarantors of the loans, and they never consented to being subject to jurisdiction in California.

Personal jurisdiction should not be exercised based solely upon theories of imputed conduct such as alter ego and conspiracy against foreigners who purposefully

structured their contractual arrangements with the plaintiff to avoid being haled into court in California. Comerica could have easily provided for jurisdiction over the Petitioners in the lengthy and extensive loan documents, security agreements, interparty agreements and other documents that were executed as a condition for making the loans. The fact that Comerica, a bank with sophisticated legal representation, did not so provide, makes it patently unreasonable to hale Petitioners into California based solely on allegations of imputed conduct. The Petitioners respectfully request that their petition for certiorari be granted.

Respectfully submitted,

CHARLES M. COATE
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1221 Second Street, Third Floor
Santa Monica, California 90401
Tel: (310) 576-6161

Counsel for Petitioners

APPENDIX

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App. 1

Court of Appeal, Second Appellate District,
Division Five – No. B180285

S133354

IN THE SUPREME COURT OF CALIFORNIA

En Banc

GREENLIGHT FILM & TELEVISION INCORPORATED et. al., Petitioners,

v.

LOS ANGELES COUNTY SUPERIOR COURT, Respondent;

COMERICA BANK, Real Party in Interest.

(Filed Jul 13, 2005)

Petition for Review DENIED.

George, C.J., was absent and did not participate.

/s/ Werdegar
Acting Chief Justice

App. 2

Court of Appeal, Second Appellate District,
Division Five – No. B180285

S133354

IN THE SUPREME COURT OF CALIFORNIA

GREENLIGHT FILM & TELEVISION INCORPORATED
et. al., Petitioners,

v.

LOS ANGELES COUNTY SUPERIOR COURT, Respondent;

COMERICA BANK, Real Party in Interest.

(Filed Jun 16, 2005)

The time for granting or denying review in the above-entitled matter is hereby extended to and including July 22, 2005, or the date upon which review is either granted or denied.

/s/ George
Chief Justice

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

GREENLIGHT FILM & TELEVISION, INC., et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent. COMERICA BANK, Real Party in Interest.	B180285 (Super. Ct. No. BC316406) (Andria K. Richey, Judge) **ORDER** **(Filed Apr. 14, 2005)**

THE COURT:

The court has read and considered the petition for writ of mandate, filed January 6, 2005. The petition is denied.

/s/ Turner
TURNER, P.J.

/s/ Armstrong
ARMSTRONG, J.

/s/ Mosk
MOSK, J.

Charles M. Coate
Law Offices of Charles M. Coate, APC
1221 Second Street
Third Floor
Santa Monica, CA 90401

Case Number B180285
Division 5
Greenlight Film and Television, Inc.;
Gary Howsam
v.
S.C.L.A.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 12/15/04	DEPT. 31
HONORABLE ANDRIA K. RICHEY JUDGE	S. WONG DEPUTY CLERK
HONORABLE #3 JUDGE PRO TEM	ELECTRONIC RECORDING MONITOR
V. SOLIS, CA DEPUTY SHERIFF	I. LAFRANCHI CSR#9120 REPORTER

8:30 am	BC316406	Plaintiff Counsel	
	COMERICA BANK VS GARY HOWSAM ET AL		SEE BELOW
		Defendant Counsel	
	170.6 MARY ANN MURPHY		

NATURE OF PROCEEDINGS:

MOTION OF DEFENDANTS, GFT CIRCLE FILMS, INC., ROAD RAGE FILMS, INC., JANUS PRODUCTIONS, INC., GFT GOING BACK FILMS, INC., GFT HERESY FILMS, INC., GFT/REDWOOD KOTN FILMS, INC., GFT/REDWOOD INGNITION FILMS, INC., TO COMPEL ARBITRATION IN LIEU OF ANSWER AND MOTION TO STAY PROCEEDINGS;

MOTION OF DEFENDANTS, GREENLIGHT FILM AND TELEVISION INC., AND GARY HOWSAM, TO DISMISS OR STAY ACTION;
(C/F 11-17-04)

MOTION OF ABOVE NAMED DEFENDANTS, TO QUASH SERVICE OF SUMMONS FOR LACK OF PERSONAL JURISDICTION;
(C/F 11-17-04)

MOTION OF DEFENDANTS, GFT ENTERTAINMENT INC., TO QUASH SERVICE OF SUMMONS FOR LACK OF PERSONAL JURISDICTION;
(C/F 11/17/04)

CASE MANAGEMENT CONFERENCE;
(C/F 12-02-04)

PLAINTIFF	DEFENDANT
RONALD K SITTLER (X)	JAMES M KILKOWSKI (X)
ROBERT S ADDISON JR (X)	ADAM L STRELTZER (X)
MICHAEL L WACHTEL (X)	CHARLES M COATE (X)
	A RAYMOND HAMRICK III (X)
	JAMES R ZATOLOKIN (X)

MINUTES ENTERED
12/15/04
COUNTY CLERK

Matters are called for hearing argued and taken under submission.

Later, the Court rules as follows:

The motion of Greenlight/Howsam to quash for lack of personal jurisdiction is denied. The Court finds sufficient contacts to exercise at least

"specific jurisdiction" over these defendants. The motion of Greenlight/Howsam to stay/dismiss on the grounds of forum non conveniens is denied. The Court finds that California is the more convenient forum and that California has a strong interest in providing a forum for its corporate citizens (which plaintiff was at the time of these events) in which to try cases of this sort. In addition, the moving parties did not specify which other forum would be able to try this case, or indicate that all other parties would be subject to or would submit to jurisdiction in any specific forum. Canada is not one forum, but is made up of numerous provinces which may not all afford the same rights and remedies. But that issue was not addressed by moving parties.

These parties requested that the Court, if it denied their motion to quash, grant them some additional time per CCP Section 418.10(c) within which to seek relief; the Court hereby grants them 20 days from service of this order within which to file a petition for review.

The motion of GFT Entertainment to quash for lack of personal jurisdiction shall be continued so the discovery on jurisdictional issues may be conducted. The Court shall continue the motion to April 19, 2005 at 8:30. A supplemental opposition to the motion shall be filed on or before April 5, 2005, and shall be personally served on all parties. A supplemental reply shall be filed on or before April 13, 2005 and shall be personally served. Any evidentiary objections to any reply declarations must be filed and personally served on or before April 15, 2005.

As to the motion to compel arbitration, the parties to that motion are to file supplemental briefs

on the issues addressed in the Court's tentative provided at the hearing. Those briefs must be filed and personally served on December 27, 2005 and copies thereof delivered to the Courtroom by noon on that day. That motion will then be submitted.

The Court rules as follows as to evidentiary objections filed by various defendants to the following declarations, to the extent these objections relate to the motions which are ruled upon herein:

Objections to Carpenter: Overruled as to paragraphs 2, 5, 10, 14-19; overruled as to paragraph 4, except as to the statement of Rector, as to which objection is sustained; overruled as to paragraph 9, except as to the statement "Howsam-controlled entities", as to which it is sustained; overruled as to paragraph 8, except for the introductory statement as to control, as to which it is sustained; otherwise sustained.

Objections to Gross: Overruled

Objections to Addison: Overruled as to paragraphs 2-4, 9-17, exhibits N and O; otherwise sustained.

As to objections of Plaintiff to Sacks declaration, they are sustained for lack of foundation and speculation. The Case Management Conference is continued to January 20, 2005 at 8:30 a.m. in Department 31. Parties are to meet and confer prior to that date on arbitration of this entire dispute, and if no agreement is reached then to select mediator, discovery referee and consider whether accounting reference is needed.

Clerk to give notice.

CLERK'S CERTIFICATE OF MAILING/ NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 12-15-04 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: December 15, 2004

John A. Clarke, Executive Officer/Clerk

By: /s/ S. Wong
S. Wong

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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

Specially appearing Defendants GREENLIGHT FILM & TELEVISION, INC., an Ontario, Canada, corporation, and GARY HOWSAM, a Canadian national, Petitioners, vs. SUPERIOR COURT OF THE COUNTY OF LOS ANGELES, Respondent.	Case No. S133354 [Appellate No. B180285; Superior Court No. BC316406]
COMERICA BANK, a Michigan corporation, Real Part In Interest.	

PETITION FOR REVIEW

After a decision by the Court of Appeal
Second District, Division Five

(Filed Apr. 25, 2005)

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Attorneys for Petitioners and Specially Appearing Defendants, Greenlight Film & Television Inc., an Ontario Canada Corporation and Gary Howsam, a Canadian national

ISSUE PRESENTED FOR REVIEW

Can personal jurisdiction be exercised over a citizen of a foreign country based solely upon an allegation – unsupported by admissible proof – that the defendant is the alter ego of, or engaged in a conspiracy to defraud with, another defendant – as the Second District Court of Appeal held in this case or does the law require the plaintiff to establish proof of these matters by a preponderance of admissible evidence – as the First and Fifth District Courts of Appeal, with respect to alter ego, and the First and Fourth District Courts of Appeal, with respect to conspiracy, have held in other cases?

WHY REVIEW SHOULD BE GRANTED

In *Sheard v. Superior Court* (1974) 40 Cal.App.3d 207, the First District Court of Appeal held that in the absence of admissible evidence and based solely upon alter ego allegations, personal jurisdiction cannot be exercised over a non-resident defendant. In *Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, the Fifth District Court of Appeal reached the same conclusion. In *Mansour v. Superior* Court (1995) 38 Cal.App.4th 1750, the Fourth District Court of Appeal held that personal jurisdiction could not be exercised over a non-resident defendant in the absence of admissible evidence and based solely upon allegations of conspiracy. The First District Court of Appeal reached the same result in *Crea v. Court of Appeal* (1996) 48 Cal.App.4th 509.

Here, the Second District Court of Appeal reached the contrary result. Its decision is thus in conflict with those of the First, Fourth and Fifth District Courts of Appeal. Specifically, the Second District Court of Appeal denied

review of the trial court's order denying a motion to quash service based upon a lack of personal jurisdiction where there was no admissible evidence that the defendants were the alter ego of, or had conspired with, the alleged primary tortfeasors.

Accordingly, review should be granted under California Rule of Court 28(b) in this case to secure uniformity of decision by resolving this implicit conflict amongst Districts of the Court of Appeal. A uniform rule is necessary to avoid the unacceptable circumstance where personal jurisdiction may be exercised over a foreign defendant in one part of the State while personal jurisdiction will be denied over a foreign defendant under the same or similar facts in another part of the State.

INTRODUCTION

A. Background

In this case, Plaintiff and Real Party In Interest Comerica Bank ("Comerica"), a Michigan corporation, seeks to recover repayment of certain loans it made to several of the defendants in the underlying action as part of the financing for the production of seven feature films (the "Films"). The Films were produced in Canada or co-produced in Canada and the United Kingdom by Canadian and/or United Kingdom corporations and were to be distributed in foreign countries.

Neither of Petitioners, Gary Howsam ("Howsam"), a Canadian citizen, nor Greenlight Film & Television, Inc. ("GFTI"), an Ontario, Canada corporation, were parties to the loan agreements. It is thus undisputed that no contractual privity exists between Howsam and GFTI, on the

one hand, and Comerica, on the other hand. Rather, Comerica has named Howsam and GFTI as defendants based solely upon an alter ego theory or having conspired with the borrower-defendants to defraud Comerica in connection with the loans.

Howsam and GFTI specially appeared and moved to quash service of the First Amended Complaint on them, asserting a lack of personal jurisdiction under C.C.P. § 418.10(c). Comerica proffered no competent admissible evidence of the alter ego allegations or that either defendant had conspired with the borrower-defendants. Indeed, the trial court sustained the objections of Howsam and GFTI to Comerica's purported evidence of forgery and fraud.

Despite Comerica's failure to meet its required evidentiary burden, the trial court determined that specific jurisdiction existed over petitioners Howsam and GFTI. They timely sought a writ of mandate, but the Second District Court of Appeal denied it on April 14, 2005, a copy of the order of which is attached hereto. This denial of relief conflicts with the decisions of the First and Fifth Circuits and this Court in similar circumstances. Accordingly, relief should be granted in this Court to create uniformity of decision.

B. Howsam and GFTI Have No "Contacts" With California

Howsam and GFTI are named as two of the defendants in the underlying action by Comerica, styled as *Comerica Bank v. Gary Howsam, et al.*, Los Angeles County Superior Court case no. BC 316406. Howsam lives

in Toronto, Canada, and is the President of GFTI. (Petitioner's Exhibits ("PE"), Vol. I, Ex. 1, pp. 1-1-3.)[1]

GFTI is an Ontario, Canada corporation that maintains its principal place of business in Toronto, Ontario. (PE, Vol. I, Ex. 1, p. 2.) GFTI is not now or has never been qualified to do business in the State of California. (*Id.*)

None of GFTI's officers or directors, including Howsam, reside or are domiciled in the State of California. (PE, Vol. I, Ex. 1, p. 2.) GFTI has no employees residing or domiciled in California. (*Id.*) GFTI has no branch office or comparable facilities in California, and has no telephone listings or mailing addresses in California. (*Id.*) No meetings of GFTI's board of directors or shareholders have been held in California and none of its officers or directors has attended business conferences in such capacities within the State of California. (*Id.*)

Neither GFTI nor Howsam maintain any bank accounts or other tangible personal or real property in the State of California. (PE, Vol. I, Ex. 1, p. 2.) GFTI does not direct any of its advertising specifically toward California residents nor does it advertise in publications that are directed primarily toward California residents. (*Id.*)

At no time has Howsam individually or GFTI ever entered into a written agreement with Comerica. (PE, Vol. I, Ex. 1, p. 2.) At no time did Howsam ever meet with Comerica's transactional attorney, G. Raymond F. Gross, in his personal capacity, rather, at all times, Howsam was

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[1] References to "Petitioners' Exhibits" are to those filed with the Court of Appeal in this matter.

acting in the course and scope of his duties on behalf of a foreign corporate entity. (*Id.*, at Vol. 5, Ex. 24, p. 5.)

At no time has Howsam ever forged the name of any foreign distributor on a distribution agreement or a notice of assignment or copied or pasted the name of any foreign distributor on a distribution agreement or a notice of assignment. (PE, Vol. 5, Ex. 24, p. 2.) In contrast, Howsam categorically denied that any such conduct occurred. (*Id.*, at Vol. 5, Ex. 24, p. 5.)

Moreover, neither Howsam nor GFTI is a signatory to any of the loan agreements, distribution agreements or notices of assignments at issue in this case; Howsam has never personally sought financing from the real party in interest, rather Howsam has always acted on behalf of corporate entities in connection with the production of motion pictures; and Howsam is not a party to any personal guarantees in favor of the real party in interest in connection with the disputed motion pictures in this action. (PE, Vol. 5, Ex. 24, p. 2.) Howsam also did not submit any of the subject license agreements to Comerica. (*Id.*, at Vol. 5, Ex. 24, p. 3.)

C. The Court of Appeal Erred When It Refused to Quash Service

On October 27, 2004, Howsam and GFTI specially appeared in the underlying action and moved to quash service of summons, and to stay or dismiss this action against them on grounds of forum non conveniens. (PE, Vol. I, Exs. 1-5.) On December 15, the trial court heard the motion to quash filed by Howsam and GFTI and took it under submission. (*Id.* at Vol. V, Ex. 29.) Later that day, the trial court issued its order.

Notably, the trial court sustained the objections of Howsam and GFTI to Comerica's purported evidence of forgery and fraud. (*Id.*, e.g., at Vol. V, Ex. 30, pp. 3-4 (objections sustained to Exh. N and O to Addison Decl).) Nevertheless, the trial court denied their motion to quash, finding that at least "specific" jurisdiction over defendants existed in this case and that California was the most convenient forum. (*Id.* at Vol. V, Ex. 30 at p. 2 of 6.)

Howsam and GFTI timely filed a Petition For Writ of Mandate, Prohibition or Other Appropriate Relief with the Second District Court of Appeal from the denial of their motion to quash on January 6, 2005. The Court of Appeal denied the requested relief on April 14, 2005 in a two-line Order, a copy of which is attached hereto as required.

REVIEW SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE HOLDING BELOW AND THOSE IN OTHER DISTRICTS AND THIS COURT CONCERNING THE APPLICABLE STANDARD OF PROOF FOR PERSONAL JURISDICTION OVER NON-RESIDENTS FOR CLAIMS BASED ON ALTER EGO AND CONSPIRACY

Where as here, personal jurisdiction "is challenged by a non-resident [in this case foreign] defendant, the burden of proof is upon the plaintiff to demonstrate that 'minimum contacts' exist between defendant and the forum state to justify imposition of personal jurisdiction." (*Sheard v. Superior Court, supra,* 70 Cal. App. 3d. at 430.) The plaintiff must demonstrate "by a preponderance of the evidence that all necessary jurisdictional criteria are met. The jurisdictional facts must be proved by competent, admissible evidence. (*Evangelize China Fellowship, Inc. v.*

Evangelize China Fellowship, Inc. (1983) 146 Cal. App. 3d 440, 444.)

Hearsay is not competent proof (*Floveyor International, Ltd. v. Superior Court* (1997) 59 Cal. App. 4th 789, 796 (declaration by plaintiff's attorney stating "discovery in this case revealed . . . "was "nothing more than inadmissible hearsay.").) Similarly, an unverified complaint is insufficient proof. (*Ziller Elec. Lab. GmbH v. Superior Court* (1985) 206 Cal. App. 3d 1222, 1232-33; *Mihlon v. Superior Court* (1985) 165 Cal. App. 3d 703, 710.)

A. The Decision On the Alter Ego Claim Conflicts With Two Prior Decisions In California

The decision below, stands for the proposition that personal jurisdiction *can* be exercised over a non-resident and foreign defendant based solely upon an *allegation* of alter ego liability, squarely conflicts with prior decisions in California, namely, *Sheard v. Superior Court, supra,* 40 Cal.App.3d 207, and *Sonora Diamond Corp. v. Superior Court, supra,* 83 Cal.App.4th 523. This conflict requires review by this Court to "secure uniformity of decision." (*Peralta Community College District v. Fair Employment & Housing Commission* (1990) 52 Cal.3d 40, 44.)

1. In *Sheard*, the First District Court of Appeal Required Admissible Evidence of Proof of An Alter Ego Relation to Exercise Personal Jurisdiction

In *Sheard v. Superior Court, supra,* 40 Cal.App.3d 207, the plaintiff filed an action against a Wisconsin corporation and some of its stockholders for personal injuries caused in California. The plaintiff included the

stockholders as defendants under a theory of alter ego liability.

The stockholder defendants then moved to quash service of the summons and complaint for lack of personal jurisdiction. Their motion was supported by affidavits that established a lack of contacts with California. In opposition, the plaintiff filed a declaration that proffered facts showing that he could allege alter ego claims, but lacked proof of the actual existence of the alter ego relationship. (*Sheard, supra,* 40 Cal.App.3d at 211.)

The trial court denied the motion. On appeal, however, the First District Court of Appeal reversed, holding that there was no admissible evidence that established the existence of an alter ego relationship. Accordingly, the court could not exercise personal jurisdiction over the defendant. (*Id.* at 211-213.)

2. In *Sonora*, the Fifth District Court of Appeal Reached the Same Result

An identical result was reached by the Fifth District Court of Appeal in *Sonora Diamond Corp. v. Superior Court, supra,* 83 Cal.App.4th 523. There, the plaintiff sued Sonora Mining Corp. and its parent company, Sonora Diamond Corp., for breach of contract. Sonora Diamond had no contacts with California and jurisdiction was based upon an allegation that it was the alter ego of Sonora Mining Corp.

Sonora Diamond filed a motion to quash. The trial court denied the motion, but the Fifth District Court of Appeal reversed, explaining in pertinent part:

> In California, two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone . . . [¶] Here, at least one of the two essential elements of the alter ego doctrine was not established; there was no evidence of any wrongdoing by either Diamond or Sonora Mining or any evidence of injustice flowing from the recognition of Sonora Mining's separate corporate identity. Without such evidence, the alter ego doctrine cannot be invoked . . .
>
> * * *
>
> The [plaintiff] is plainly wrong to the extent it claims the inclusion in a complaint of alter ego allegations automatically gives the trial court jurisdiction over the defendant against whom such allegations are directed. It is correct that a motion to quash for lack of personal jurisdiction does not implicate the merits of the complaint, but the plaintiff, in opposing the defendant's motion to quash, must present evidence to justify a finding that the requisite jurisdictional minimum contacts.

(*Sonora Diamond Corp. v. Superior Court, supra,* 83 Cal.App.4th at 528-540 [internal citations omitted].)

3. The Conflict Between the Holdings in *Sheard* and *Sonora* and the Decision Below Cannot Be Reconciled Without Review By This Court

Here, there was no admissible evidence proffered by Comerica in opposition to the motion to quash by Howsam and GFTI that established the elements of the alter ego doctrine. Indeed, there was absolutely nothing inequitable or untoward about the forming of the subject production company entities.

The competent evidence submitted by indicated the following corporate formalities: lack of ownership by Howsam in the subject production company defendants, and segregated finances by defendants and adherence to corporate records. There was an utter failure by Comerica to prove by a preponderance of admissible evidence that these Canadian petitioners, who have no contractual privity Comerica, are alter egos of their co-defendants herein for purposes of establishing jurisdiction over them.

Nevertheless, the trial court denied the motion to quash by Howsam and GFTI. The Second District Court of Appeal then denied their petition for writ of mandate, implicitly disagreeing with the holdings in *Sheard* and *Sonora*. Accordingly, this Court must grant review to create uniformity in the standards of proof throughout California sufficient for the exercise of personal jurisdiction over a non-resident defendant.

B. The Decision On the Conspiracy Theory Also Conflicts With the Rule in the First and Fourth Districts

The decision below also implicitly holds that personal jurisdiction *can* be exercised over a non-resident defendant based solely upon an *allegation* of conspiracy. This decision also directly conflicts with prior decisions in California, namely, *Mansour v. Superior Court, supra,* 38 Cal.App.4th 1750, and *Crea v. Court of Appeal, supra,* 48 Cal.App.4th 509. This conflict also requires review by this Court to "secure uniformity of decision." (*Peralta Community College District v. Fair Employment & Housing Commission, supra,* 52 Cal.3d at 44.)

In *Mansour v. Superior Court, supra,* the Fourth District Court of Appeal held that personal jurisdiction cannot be exercised over a non-resident conspirator without admissible proof of the conspiracy that satisfies the preponderance of the evidence standard. (*Id.*, 38 Cal. App. 3d at 1760.) The First District Court of Appeal reached the same result in *Crea v. Court of Appeal, supra,* 48 Cal.App.4th at 516-517.

Comerica's claims against Howsam and GFTI in the underlying action are based upon a purported conspiracy to create false license agreements and assignments to defraud Comerica. (*See* PE, Vol. I, Ex. A, ¶¶ 23, 113-116.) Comerica, however, proffered no admissible evidence on this score. Indeed, the trial court sustained the objections of Howsam and GFTI to the purported evidence of the fraud. (PE, Vol. V, Ex. 30, pp. 3-4.)

Nevertheless, the trial court denied Petitioners' motion to quash. The Second District Court of Appeal denied their petition to reverse that decision, implicitly approving a rule that conflicts with the holdings of the

First and Fourth Districts. Review is required to secure uniformity of these decisions.

CONCLUSION

For the reasons set forth herein, specially appearing Petitioners Howsam and GFTI respectfully request this Court to grant review of the issues raised herein.

Dated: April 24, 2005

COSTA, ABRAMS & COATE, LLP

By: /s/ Charles M. Coate
CHARLES M. COATE
Attorneys For Petitioners
GREENLIGHT FILM & TELEVISION, INC. and GARY HOWSAM

CERTIFICATE OF WORD COUNT

The text of this petition consists of 3,477 and the text of the table of contents and authorities consists of 310 words as counted by the Microsoft Word version 2000 word-processing program used to generate this petition.

DATED: April 24, 2005

COSTA, ABRAMS & COATE, LLP

By: /s/ Charles M. Coate
CHARLES M. COATE
Attorneys For Petitioners
GREENLIGHT FILM & TELEVISION, INC. and GARY HOWSAM

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1221 Second Street, Third Floor, Santa Monica, California 90401.

On April 24, 2005, I served the foregoing document described as PETITION FOR REVIEW on the interested parties in this action by placing a copy thereof enclosed in a sealed envelope as follows:

[X] (**BY MAIL**) I deposited such envelope in the mail at Santa Monica, California. The envelope was mailed with postage fully prepaid. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid at Santa Monica, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

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/s/ Charles M. Coate
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Appellate Case No. ___

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ___

Specially, appearing Defendants Greenlight Film & Television Inc., an Ontario, Canada corporation and Gary Howsam, a Canadian national

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent.

PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES; SUPPORTING EXHIBITS

APPEAL FROM THE SUPERIOR COURT
OF LOS ANGELES
THE HONORABLE ANDRIA K. RICHEY,
L.A.S.C. BC 316406

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INTRODUCTION.

This case presents a Michigan corporation attempting to hail a Canadian corporation and a Canadian national into California without any competent admissible evidence, let alone a preponderance of the evidence, that either has committed a tort in California or is the alter ego

of an entity that this Court has jurisdiction over. It is undisputed that no contractual privity exists between the real party in interest and petitioners herein. Despite the failure by the real party in interest to meet the burden incumbent upon it, the respondent court has determined that the exercise of specific jurisdiction over petitioners exists under these facts and that California is the more convenient forum in which to try this case, although ten of the thirteen parties are foreign and eleven out of thirteen are non California parties, including the plaintiff. Therefore, petitioners seek a writ of mandate pursuant to C.C.P. Sec. 418.10(c) to require the respondent court to enter its order quashing the service of summons or staying or dismissing the action or alternatively, request that a writ of prohibition issue to prevent further proceedings following this improper denial of petitioner's motion to quash.

At the crux of this dispute is a slate of foreign films physically produced in Canada or co-produced in Canada and the United Kingdom by Canadian and/or United Kingdom corporations and nationals. It is undisputed that no contractual privity exists between the Michigan real party in interest and petitioners herein. Indeed, California has very little interest in the production of these foreign film. Moreover, it is admitted that the real party in interest provided but a portion of the funding for this slate of foreign films to Canadian corporations in Canada; none of which are petitioners herein. Yet, real party in interest alleges that it was defrauded into funding a portion of the slate of foreign films in Canada and/or the United Kingdom and that petitioners are the "alter egos" of the Canadian corporations that produced the films at issue.

It is noted that the real party in interest was never a California corporation at the time of the alleged events as

opined by the respondent court. Moreover, no competent admissible evidence offered by the real party in interest in any way controverts the evidence submitted by petitioners that petitioners never engaged in any fraudulent conduct or forgery. Simply, what is presented is the mere theory, as opposed to any admissible evidence, of a conspiracy to defraud, which will not support the exercise of jurisdiction over a foreign defendant under California law. Nor, does the rote inclusion of alter ego allegations automatically give California jurisdiction over foreign defendants against whom such allegations are directed. Indeed, real party in interest fails to provide any competent and admissible evidence to support its wild "alter ego" theory. Nor, is there anything wrong with creating a single purpose entity in another country by nationals of that foreign country to produce a motion picture. Rather, as the real party in interest is well aware, that is standard operating procedure, and how motion pictures are commonly produced. Indeed, each Canadian corporation which accepted real party in interest's partial funding in Canada was admittedly created at the behest of and in accordance with the real party in interest's very own lending requirements.

Not surprisingly, the vast majority of relevant witnesses and documents concerning the financing and production of these foreign film productions are in Canada, not California. Clearly, Canada is a suitable alternative forum to resolve the real party in interest's claims against petitioners herein who did not enter into the written agreements at issue in this litigation. Nor, does real party in interest offer any evidence that its claims could not be heard and resolved in Canadian courts against these defendants. Accordingly, Defendants respectfully submit that a writ of mandate pursuant to C.C.P. Sec.

418.10(c) issue in this case to require the respondent court to enter its order quashing the service of summons or staying or dismissing the action. Alternatively, petitioners request that a writ of prohibition issue to prevent further proceedings following this improper denial of petitioner's motion to quash or staying or dismissing the action.

PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF.

Authenticity of Exhibits.

1. All exhibits accompanying this petition are true copies of original documents on file with respondent court. The exhibits are incorporated herein by reference as though fully set forth herein. The exhibits are numbered consecutively from 1 through 30, with specific page references throughout each such exhibit.

Beneficial Interest of Petitioners; Capacities of Respondent and Real Parties In Interest.

2. Petitioners and Specially appearing Defendants Greenlight Film & Television Inc., an Ontario, Canada corporation and Gary Howsam, a Canadian national are named defendants in an action now pending in respondent superior court entitled *Comerica Bank, a Michigan Banking corporation v. Gary Howsam, an individual, et. al.*, L.A.S.C. Case No. BC 316406. Plaintiff is named herein as the real party in interest.

Summary of Relevant Facts.

3. Specially appearing Defendant Gary Howsam is an individual over 18 years of age and a citizen of the

Province of Ontario, Canada residing in Toronto, Canada. Mr. Howsam is also the President of Greenlight Film & Television, Inc. ("GFTI") which is a corporation existing under the laws of Ontario, Canada which maintains its principal place of business at 124 Merton Street, Suite 407, Toronto, Ontario M4S 2Z2. (Petitioner's Exhibits Vol. I, Ex. 1, p. 2)

4. GFTI is not now or has never been qualified to do business in the State of California. (Petitioner's Exhibits Vol. I, Ex. 1, p. 2)

5. None of GFTI's officers or directors, including Howsam, reside or are domiciled in the State of California. (Petitioner's Exhibits Vol. I, Ex. 1, p. 2)

6. GFTI has no employees, residing or domiciled in California. (Petitioner's Exhibits Vol. I, Ex. 1, p. 2)

7. GFTI has no branch office or comparable facilities in California, and has no telephone listings or mailing addresses in California. (Petitioner's Exhibits Vol. I, Ex. 1, p. 2)

8. Neither GFTI nor Howsam maintain any bank accounts or other tangible personal or real property in the State of California. (Petitioner's Exhibits Vol. I, Ex. 1, p. 2)

9. GFTI does not direct any of its advertising specifically toward California residents nor does it advertise in publications that are directed primarily toward California residents. (Petitioner's Exhibits Vol. I, Ex. 1, p. 2)

10. No meetings of GFTI's board of directors or shareholders have been held in California; none of its officers or directors have attended business conferences in

such capacities within the State of California. (Petitioner's Exhibits Vol. I, Ex. 1, p. 2)

11. At no time has Howsam individually or GFTI ever entered into a written agreement with Plaintiff. Nor has Howsam individually ever entered into a written agreement with the Plaintiff. (Petitioner's Exhibits Vol. I, Ex. 1, p. 2)

12. The following are names and addresses of all person known by Petitioners to be percipient witnesses to any of the matters raised in the pleadings in this action and the matters upon which they are expected to testify:

a. Howsam resides in Toronto, Ontario, Canada and will testify to the matters set forth herein on my own behalf on behalf of GFTI;

b. Greenlight Film and Television Inc. is a Toronto, Ontario, Canada Corporation and it expected to testify to the matters to which it is a percipient witness;

Plaintiff is a Corporation existing under the laws of the State of Michigan. It is unknown what Plaintiff will testify to. (Petitioner's Exhibits Vol. I, Ex. 1, p. 3)

13. Further, the interests of justice and the convenience of the parties and witnesses would be served by transferring this action to Ontario, Canada for the following reasons: (Petitioner's Exhibits Vol. I, Ex. 1, p. 2, 3)

a. It would be burdensome and inconvenient for the majority of the witnesses set forth above to attend a trial in California because of the expense of travel away from their business and other pursuits. (Petitioner's Exhibits Vol. I, Ex. 1, p. 3)

b. It would not be possible to subpoena numerous third party Canadian witnesses for trial in California; while they are subject to process in Ontario, Canada to which transfer is sought. Such witnesses might include among others:

1) David Woodfield – Gowling Strathy and Henderson; knowledge of differentiation of Greenlight Film and Television Inc. and Production Company defendants and absence of alter ego relationship

2) GFT Circle Films Inc., GFT Heresy Films Inc., Road Rage Films Inc., Janus Productions Inc., GFT Going Back Films Inc., Gft/Redwood KOTN Films Inc., Gft/Redwood Ignition Films Inc., and Carolyn Stamegna – legal formation of Production Company defendants

3) Dave Bruner – former head of production services at Medallion PFA

4) Brian White – Technicolor, formerly Medallion PFA

5) Jane Douglas – Production Accoutant, "Global Heresy" and "The Circle"

6) Adeline Elias – production accountant who managed "Going Back" accounts

7) Tracy Boyd – "Road Rage" line producer

8) James Mou – "The Circle" line producer

9) Juliette Hagopian – line producer, "Going Back"

10) Gregor Hutchinson – post production supervisor for "Going Back" and for "Ignition" and for "Kevin of the North" and for "The Circle" and for "Global Heresy"

11) Warren Nimchuk, Price Waterhouse re financing and budget reviews of Production Company Defendants

12) Jim Sternberg, former president of The Completion Guarantors and current president of Film Finance Canada

13) John Ross, former Chairman of The Completion Guarantors. Currently Chairman of Film Finances Canada.

14) Zenon Marchowski, former loan officer and account manager of CIBC

15) Bob Presner, former President of Film Finances Canada

16) Debbie Mermelstein, former counsel to Film Finances Canada

17) David Steinberg, attorney at Heenan Blaikie

18) Claude Forest, Multimedia insurance brokers

19) Mauro Spagnolo, former VP with CIBC.

20) Oliver Groom; post production and delivery supervisor.

14. All of the books and records of GFTI and Howsam are located in Toronto, Ontario, Canada to which transfer is sought. (Petitioners' Exhibits Vol. I, Ex. 1, p. 5)

15. At no time has Gary Howsam ever forged the name of any foreign distributor on a distribution agreement or a notice of assignment. Further, Howsam has never copied or pasted the name of any foreign distributor on a distribution agreement or a notice of assignment. (Petitioners' Exhibits Vol. 5, Ex. 24, p. 2)

16. Neither Mr. Howsam nor Greenlight Film & Television Inc. are signatories to any of the loan agreements, distribution agreements or notices of assignments at issue in this case. Petitioners are simply not parties to the subject disputed contracts. Mr. Howsam has never personally sought financing from the real party in interest; rather Mr. Howsam has always acted on behalf of corporate entities in connection with the production of motion pictures. Nor is Mr. Howsam a party to any personal guarantees in favor of the real party in interest in connection with the disputed motion pictures in this action. (Petitioners' Exhibits Vol. 5, Ex. 24, p. 2)

17. "[A]mong the many documents *required* by Comerica for the loans for each Film, the corporate records detailing the formation of each SPE [single purpose entity] was provided to Comerica by [Mr.] Howsam." (Petitioners' Exhibits Vol. III, Ex. 16, p. 5)

18. It is required practice by Comerica and other lenders in the motion picture industry for a corporate or limited liability entity to be established in order to accept loan proceeds, pay production and distribution expenditures, and convey and sell rights. It also serves the interests of Plaintiff in the event it wishes to exercise its rights to foreclose on its collateral, including any and all rights in and to the disputed motion pictures. (Petitioners' Exhibits Vol. 5, Ex. 24, p. 3)

19. Mr. Howsam never submitted any of the subject license agreements to Plaintiff. (Petitioners' Exhibits Vol. 5, Ex. 24, p. 3)

20. On October 27, 2004 specially appearing defendants moved to quash service of summons and to stay or

dismiss this action against them on grounds of forum non conveniens. (Petitioners' Exhibits Vol. I, Exs. 1-5)

21. A continuance of the healing date and an extension of real party in interest's time to oppose the motions was granted upon its ex parte application and thereafter opposition papers were filed and served pursuant to the extension on December 3, 2004. No additional time to reply was provided for in the Court's order granting the ex parte application. (Petitioners' Exhibits Vol. I, Exs. 6-8; Vol. I Exs. 10-13; Vol. II Exs. 14, 15; Vol. III, Ex. 16, subparts A-I; Vol. IV, Ex. 16 subparts J-Z)

22. At no time did Mr. Howsam ever meet with G. Raymond F. Gross in his personal capacity. At all times, Mr. Howsam was acting in the course and scope of his duties on behalf of a foreign corporate entity. (Petitioners' Exhibits Vol. 5, Ex. 24, p. 5)

23. The declarations of Robert Addison, Carmen Carpenter and G. Raymond F. Gross are devoid of any statement by anyone with personal knowledge that Mr. Howsam ever forged or caused a document to be forged. (Petitioners' Exhibits Vol. I, Ex. 13; Vol. II, Ex. 14, and Vols. III and IV, Ex. 16) Vol. 5, Ex. 24, p. 5)

24. Mr. Howsam categorically denied that any such conduct occurred. (Petitioners' Exhibits Vol. 5, Ex. 24, p. 5)

25. On December 10, 2004 reply papers and evidentiary objections to the evidence submitted in opposition to the motion to quash service of summons and to stay or dismiss this action against specially appearing defendants on grounds of forum non conveniens were filed by specially appearing defendants. The evidentiary objections effectively assert that no admissible evidence of alleged forgery

by specially appearing defendants was offered by the real party in interest; nor, was any admissible evidence of an alter ego relationship between specially appearing defendants and other defendants herein offered. (Petitioners' Exhibits Vol. V, Exs. 17-24)

26. On December 14, 2004 real party in interest filed and served evidentiary objections and responses to evidentiary objections. (Petitioners' Exhibits Vol. V, Exs. 25-28) Later that day the court issued its tentative ruling for the hearing on December 15, 2004 summarily denying the motions.

27. On December 15, 2004 the court's tentative ruling summarily denying the motions was orally argued, and deemed submitted. (Petitioners' Exhibits Vol. V, Ex. 29 is a true and correct copy of the December 15, 2004 Reporter's Transcript) The court later that day issued its order ruling on the evidentiary objections and adopted its tentative ruling denying the motion to quash service of summons and to stay or dismiss this action against specially appearing defendants on grounds of forum non conveniens, finding that at least "specific" jurisdiction over defendants existed in this case and that California was the most convenient forum. (Petitioner's Exhibits Vol. V, Ex. 30 at p. 2 of 6; Petitioners' Exhibits Vol. V, Ex. 30 is a true and correct copy of the December 15, 2004 order denying specially appearing defendants' motion to quash and to stay or dismiss this action on grounds of forum non conveniens)

28. Although twenty days additional leave of court was sought to file the instant writ pursuant to C.C.P. Sec. 418.10(c), given the intervening Christmas and New Years Holidays and the vacation plans of petitioner Howsam and

his counsel, only ten (10) additional days were granted by respondent court, thereby allowing specially appearing defendants twenty (20) days from notice of the Court's Order by mail in which to petition the court's ruling. The order extended the time to file and serve the instant writ to January 10, 2004. (Dec. 15, 2004 + 5 for mail + 20 days leave = January 9, 2005 (Sunday) – Monday, January 10, 2005.

Basis for Relief.

29. The first issue presented in this writ is whether "specific" personal jurisdiction exists over these specially appearing Canadian defendants herein and whether California is an inconvenient forum for this international motion picture financing and distribution dispute under C.C.P. Sec. 418.10(a). The respondent superior court has concluded in error affirmatively as to both despite the absence of any admissible evidence of fraud or forgery or a conspiracy to commit such acts by these specially appearing defendants or an alter ego relationship between specially appearing defendants and other named defendants in this action. In short, the inclusion in a complaint of alter ego allegations does not automatically give the trial court jurisdiction over the defendant against whom such allegations are directed. The plaintiff, in opposing a defendants motion to quash, must present evidence to justify a finding that the requisite jurisdictional minimum contacts exist (*Floveyor Internat., Ltd. v. Superior Court* (1997) 59 Cal. App. 4th 789, 793 [69 Cal. Rptr. 2d 457] quoted by (*Sonora Diamond Corporation v. Superior Court* (2000) 83 Cal. App. 4th 523.) As this burden has not been met in this case, an appropriate writ of mandate and or prohibition should issue in this case.

The second issue presented is whether California is truly the most convenient forum in which to try this case, when ten of the thirteen parties are foreign and eleven out of thirteen are non California parties, including the plaintiff. It is undisputed that as stated above, the case involves films physically produced and financed in Canada and/or the United Kingdom by primarily Canadians. Further, all defendants are alleged to be agents of each other. The majority of witnesses do in fact reside in Canada, not California, a fact not disputed by the real party in interest. Under the circumstances, petitioners again request that an appropriate writ of mandate and or prohibition should issue in this case.

Appropriateness of Writ review.

30. A petition for writ of mandate is the appropriate method to challenge an order denying a motion to quash service of summons for lack of personal jurisdiction or to stay or dismiss the action on the ground of inconvenient forum. (C.C.P. Sec. 418.10(c); *Hunt v. Superior Court* (2000) 81 Cal. App. 4th 901, 905; See also *Community Redevelopment Agency v. Superior Court (Maynard)* (1967) 248 Cal. App. 2d 164, 180; writ of prohibition may issue to prevent further proceedings following improper denial of motion to quash. In the event that this writ is not reviewed at this time, petitioners may be required to defend an extremely expensive action in another country that petitioners are steadfast in their belief has no jurisdiction over them and one that presents an extremely inconvenient forum to them. Conversely, the real party in interest is a bank with billions of dollars in assets and clearly has the financial wherewithal to prosecute this action in Canada, the place truly giving

rise to this dispute. Accordingly, petitioners respectfully submit that it is essential that this matter be reviewed at this time.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully pray for the following relief:

1. Peremptory Writ of Mandate compelling Respondent to vacate its Order denying the motion to quash service of summons and to stay or dismiss this action against specially appearing defendants on grounds of forum non conveniens;

2. Alternatively, a Writ of Prohibition preventing further proceedings against specially appearing defendants herein;

3. An award to Petitioners of their costs pursuant to rule 56.4 of the California Rules of Court; and

4. Such other and further relief as may be just and proper.

Dated: January 3, 2005

COSTA, ABRAMS & COATE, LLP

By: /s/ Charles M. Coate
Charles M. Coate
Attorneys For Petitioners
Greenlight Film &
Television, Inc. and
Gary Howsam

VERIFICATION

I, CHARLES M. COATE, declare as follows:

1. I am an attorney at law duly licensed to practice before the Courts of the State of California and am a partner of Costa Abrams & Coate, llp and one of the attorneys for the petitioners herein. I have read the foregoing petition for writ of mandate, prohibition or other appropriate relief and know its contents. The facts alleged in the petition are within my own knowledge, except where they are stated on information and, as to them, I believe them to be true. If called upon to do so, I could and would competently testify to them.

2. Exhibits A, 1 through 30 in the accompanying Exhibits Re Petition For Writ of Mandate, Prohibition or Other Appropriate Relief are true and correct copies of the original documents.

3. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and executed on this 3rd day of January, 2005 at Santa Monica, California.

/s/ Charles M. Coate
CHARLES M. COATE

MEMORANDUM OF POINTS AND AUTHORITIES.

I. PETITIONERS ARE ENTITLED TO A DE NOVO REVIEW IN THIS CASE.

A petition for writ of mandate is the appropriate method to challenge an order denying a motion to quash service of summons for lack of personal jurisdiction.

(*McCorkle v. City of Los Angeles* (1969) 70 Cal. 2d 252, 256-257 [74 Cal. Rptr. 389, 449 P.2d 453].) Review is de nova where the facts are undisputed. (*Hall v. LaRonde* (1997) 56 Cal. App. 4th 1342, 1346 [66 Cal. Rptr. 2d 399]) In this case, no oral testimony was heard and it is undisputed that the parties agree that all facts submitted in evidence before this Court is what was submitted to the trial court below. Even under the substantial evidence review standard, which should not apply here, as set forth below, the trial court's decision is not supported by substantial evidence.

II. THE REAL PARTY IN INTEREST FAILED TO OFFER COMPETENT ADMISSIBLE EVIDENCE THAT JURISDICTION OVER SPECIALLY APPEARING DEFENDANTS EXISTED, LET ALONE ESTABLISHED ITS BURDEN BY A PREPONDERANCE OF THE EVIDENCE.

Where as here, personal jurisdiction "is challenged by a non-resident (in this case foreign) defendant(s), the burden of proof is upon the Plaintiff to demonstrate that 'minimum contacts' exist between defendant and the forum state to justify imposition of personal jurisdiction." *Shearer v. Superior Court*, 70 Cal. App. 3d. 424, 430 (1977). Plaintiff must demonstrate "by a preponderance of the evidence that all necessary jurisdictional criteria are met." An unverified complaint may *not* be considered as an affidavit supplying necessary facts, and is of no evidentiary value in determining personal jurisdiction. *Ziller Elec. Lab. GmbH v. Superior Court*, 206 Cal. App. 3d 1222, 1232-33 (1988); *Mihlon v. Superior Court*, (1985) 165 Cal. App. 3d 703, 710. Correspondingly, jurisdictional facts must be proved by competent evidence. *Evangelize China*

Fellowship, Inc. v. Evangelize China Fellowship, Inc. (1983) 146 Cal. App. 3d 440, 444. In turn, hearsay declarations are not competent proof of facts alleged. *Floveyor Int'l Ltd. v. Sup. Ct.* (1997) 59 Cal. App. 4th 789, 796: declaration by plaintiff's attorney stating "discovery in this case revealed . . . "was "nothing more than inadmissible hearsay."

According to commentators Weil & Brown, declarations should be obtained from persons with personal knowledge of defendant's activities in California. Mere allegations claiming "personal knowledge" may not suffice if the source of such knowledge is unclear. Weil & Brown, *CIV. PRO. BEFORE TRIAL* (TRG 2004) [3:389.1]

Moreover, where jurisdiction is asserted on the basis of defendant's having caused tortious effects in California, defendant may defeat jurisdiction by unequivocal proof that it did not cause Plaintiff's injury. Plaintiff "cannot demand that we judge the question of jurisdiction in the light of a claim he apparently does not have." *J.M. Sahlein Music Co., Inc. v. Nippon Gakki Co., Ltd.* (1987) 197 Cal. App. 3d 539, 545. Where there are conflicts in the evidence, the trial court may decide who to believe. *Evangelize China Fellowship, Inc. v. Evangelize China Fellowship, Inc., supra.*

Here, as the evidentiary objections to the declarations of Robert S. Addison, Jr., Carmen Carpenter and G. Raymond F. Gross memorialized, the declarations submitted by Plaintiff were rife with hearsay, unsubstantiated conclusions and statements that were not based on personal knowledge. There was simply no competent admissible evidence submitted by the real party in interest that petitioners committed any fraudulent or tortious act in

California that would force these foreign petitioners to submit to jurisdiction in this court. In the absence of admissible competent evidence in support of the real party in interest's position, let alone by a preponderance of the evidence, a peremptory writ of mandate should issue.

III. CALIFORNIA LAW DOES NOT RECOGNIZE REAL PARTY IN INTEREST'S THEORY THAT CONSPIRACY TO DEFRAUD SERVES AS AN ADEQUATE BASIS FOR ACQUIRING JURISDICTION OVER A PARTY.

The thrust of real party in interest's case is that specially appearing defendants among other local co-defendants conspired to create false license agreements and assignments to defraud the real party in interest. (See Petitioner's Exhibits, Vol. I, Ex. A, Para. 23 of First Amended Complaint and Third Cause of Action at Paras. 113-116). However, there was no competent admissible evidence submitted by the real party in interest that one alleged false or fraudulent document was presented to it by petitioners herein. Moreover, California law does not recognize conspiracy as a basis for acquiring personal jurisdiction over a party. [Indeed,] the cases expressly considering the issue have rejected it. *Mansour v. Superior Court* (1995) 38 Cal. App. 3d 1750, 1760 quoting (*Kaiser Aetna v. Deal* (1978) 86 Cal. App. 3d 896, 901 [150 Cal. Rptr. 615] [action arising from fraudulent land transactions; "Allegations of conspiracy do not establish as a matter of law that if there is one resident conspirator, jurisdiction may be exercised over nonresident conspirators."]; *Kipperman v. McCone* (N.D.Cal. 1976) 422 F. Supp. 860, 873, fn. 14 [action involving illegal mail surveillance; applying California law; "personal jurisdiction over any

non-resident individual must be premised upon forum-related acts personally committed by the individual. Imputed conduct is a connection too tenuous to warrant the exercise of personal jurisdiction."]; *Edmunds v. Superior Court* (1994) 24 Cal. App. 4th 221, 233 [29 Cal. Rptr. 2d 281].

Therefore, even though the real party in interest named local defendants in the action, the adding of foreign specially appearing petitioners herein as purported named co-conspirators does not magically boot strap the real party in interest into asserting jurisdictionally defective claims against petitioners herein. In short, there is nothing in the evidence presented to this court that these foreign specially appearing petitioners who have *no* contractual ties with the real party in interest, in any way committed a fraud in California. There was nothing presented by the real party in interest evidencing that Greenlight Film & Television Inc. and/or Gary Howsam somehow forged distribution agreements or notices of assignment. On the other hand, petitioner Gary Howsam categorically and emphatically denied that such alleged events occurred. On the basis of the record before this court, the real party in interest's theory could not support a finding of jurisdiction against petitioners and a writ of mandate and or prohibition is warranted in this case.

IV. THE REAL PARTY IN INTEREST FAILED TO ESTABLISH JURISDICTION BY A PREPONDERANCE OF COMPETENT ADMISSIBLE EVIDENCE AS TO SPECIALLY APPEARING PETITIONER HOWSAM AND GREENLIGHT FILM & TELEVISION INC. UNDER ITS ALTER EGO THEORIES.

The analysis to be employed by the trial court when one of the bases for asserting personal jurisdiction over a

foreign defendant is the alter ego doctrine was recently explained in *Sonora Diamond Corp. v. Superior Court*, (2000) 83 Cal. App. 4th 523. In *Sonora* the Court of Appeal of California, Fifth Appellate District granted a petition for writ of mandate denying a motion to quash service of process and ordered the motion granted holding that the inclusion of alter ego allegations does not automatically give the trial court jurisdiction over the defendant against whom such allegations are directed. In arriving at its conclusion the Fifth Appellate District stated:

> A. Alter Ego
>
> In the trial court, the District argued it proved Sonora Mining was the alter ego of Diamond and therefore that the corporate identity of Sonora Mining should be disregarded. As a result, the District took the position Sonora Mining's actions and presence in California must be attributed to Diamond, so that in legal effect Diamond was a California corporation engaged in an ongoing California business and subject to the general jurisdiction of the California courts (see *AT&T*, supra, 94 F.3d at p. 591; *Alberto v. Diversified Group, Inc.* (5th Cir. 1995) 55 F.3d 201, 205; *Wells Fargo & Co. v. Wells Fargo Exp. Co.* (9th Cir. 1977) 556 F.2d 406, 415).[6]

---

[6] The District maintains that the alter ego theory of jurisdiction is not at issue on this appeal because this was not the ground relied upon by the trial court to deny Diamond's motion. However, whatever the basis for the trial court's decision, the alter ego theory was raised in the trial court and we must therefore address it because we must affirm if the trial court's ruling

can be sustained on any ground presented to that court. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 340, pp. 382-383.)

Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations. (*Wenban Estate, Inc. v. Hewlett* (1924) 193 Cal. 675, 696 [227 P. 723]; *Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal. App. 4th 980, 993 [41 Cal. Rptr. 2d 618]; *Robbins v. Blecher* (1997) 52 Cal. App. 4th 886, 892 [60 Cal. Rptr. 2d 815 J.) A corporate identity may be disregarded – the "corporate veil" pierced – where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation. (*Roman Catholic Archbishop v. Superior Court* (1971) 15 Cal. App. 3d 405, 411 [93 Cal. Rptr. 338].) Under the alter ego doctrine, then, when the corporate form is used to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the courts will ignore the corporate entity and deem the corporation's acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners. (*Robbins v. Blecher,* supra, 52 Cal. App. 4th at p. 892; *Communist Party v. 522 Valencia, Inc.*, supra, 35 Cal. App. 4th at pp. 993-994.) The alter ego doctrine prevents individuals or other corporations from misusing the corporate laws by the device of a sham corporate entity formed for the purpose of committing fraud or other misdeeds. (*Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal. App. 2d 825, 842 [26 Cal. Rptr. 806].)

In California, two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone. (*Automotriz etc. De California v. Resnick* (1957) 47 Cal. 2d 792, 796 [306 P.2d 1, 63 A.L.R.2d 1042]; *Hennessey's Tavern, Inc. v. American Air Filter Co.* (1988) 204 Cal. App. 3d 1351, 1358 [251 Cal. Rptr. 859]; *Alberto v. Diversified Group, Inc.*, supra, 55 F.3d at p. 205; Calvert, supra, 875 F. Supp. at p. 678.) Among the factors to be considered in applying the doctrine are commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other." (*Roman Catholic Archbishop v. Superior Court*, supra, 15 Cal. App. 3d at pp. 406, 411; *Associated Vendors, Inc. v. Oakland Meat Co.*, supra, 210 Cal. App. 2d at pp. 838-839.) Other factors which have been described in the case law include inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers. (See *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal. App. 4th 1269, 1285 [31 Cal. Rptr. 2d 433]; *Associated Vendors, Inc. v. Oakland Meat Co.*, supra, 210 Cal. App. 2d at pp. 838-839; *Alberto v. Diversified Group, Inc.*, supra, 55 F.3d at p. 205.) No one characteristic governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied. (*Talbot v.*

Fresno-Pacific Corp. (1960) 181 Cal. App. 2d 425, 432 [5 Cal. Rptr. 361].) Alter ego is an extreme remedy, sparingly used. (*Calvert*, supra, 875 F. Supp. at p. 678.)

Here, at least one of the two essential elements of the alter ego doctrine was not established; there was no evidence of any wrongdoing by either Diamond or Sonora Mining or any evidence of injustice flowing from the recognition of Sonora Mining's separate corporate identity. Without such evidence, the alter ego doctrine cannot be invoked. (*Meadows v. Emett & Chandler* (1950) 99 Cal. App. 2d 496, 498 [222 P.2d 145]; *Alberto v. Diversified Group, Inc.*, supra, 55 F.3d at p. 205; see also *Tomaselli v. Transamerica Ins. Co.*, supra, 25 Cal. App. 4th at p. 1285; *Calvert*, supra, 875 F. Supp. at p. 678.)

Misconduct or injustice was not proved by Sonora Mining's apparent inability to meet the balance of its endowment obligation to the District. The alter ego doctrine does not guard every unsatisfied creditor of a corporation but instead affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form. Difficulty in enforcing a judgment or collecting a debt does not satisfy this standard. (*Associated Vendors, Inc. v. Oakland Meat Co.*, supra, 210 Cal. App. 2d at p. 842; *Alberto v. Diversified Group, Inc.*, supra, 55 F.3d at p. 207; *Lowell Staats Min. Co. v. Pioneer Uravan, Inc.* (10th Cir. 1989) 878 F.2d 1259.)

Similarly misconduct or injustice was not proved by the many advances made by Diamond for the benefit of Sonora Mining because none were shown to have been made with a fraudulent

or deceptive intent. (*Lowell Staats Min. Co. v. Pioneer Uravan, Inc.*, supra, 878 F.2d at p. 1262.) The parent is not "exposed to liability for the obligations of [the subsidiary] when [the parent] contributes funds to [the subsidiary] for the purpose of assisting [the subsidiary] in meeting its financial obligations and not for the purpose of perpetrating a fraud." (Id. at p. 1263.)

As we understand the District's argument, it maintains in part that, because it raised the alter ego doctrine as a substantive issue in its complaint against Diamond, it was not obliged to prove such allegations in order to establish jurisdiction on that ground. The District cites the rule that a motion to quash for lack of personal jurisdiction does not put the merits of the complaint at issue. (*Kroopf v. Guffey* (1986) 183 Cal. App. 3d 1351, 1360 [228 Cal. Rptr. 807].)

The District is plainly wrong to the extent it claims the inclusion in a complaint of alter ego allegations automatically gives the trial court jurisdiction over the defendant against whom such allegations are directed. It is correct that a motion to quash for lack of personal jurisdiction does not implicate the merits of the complaint, but the plaintiff, in opposing the defendant's motion to quash, must present evidence to justify a finding that the requisite jurisdictional minimum contacts exist (*Floveyor Internat., Ltd. v. Superior Court* (1997) 59 Cal. App. 4th 789, 793 [69 Cal. Rptr. 2d 457]; see generally 2 Witkin, Cal. Procedure (4th ed. 1996) Jurisdiction, § 211, pp. 775-776.) (Emphasis Added.) (*Sonora Diamond Corporation, supra.* at 835-837.)

Here, there was absolutely nothing inequitable or untoward about the forming of the subject production

company entities. Indeed, each was created in accordance with the specific requirements of the real party in interest. Absent the creation of each of these production companies, no films would be produced or funded. Similarly, a claim of undercapitalization as a reason to pierce the corporate veil with respect to each production company would render virtually every non-studio movie made today a fraud by definition. Simply, if the mere formation of these production entities perpetrated a fraud, then every production loan made by real party in interest in connection with every motion picture that it funds is also a fraud. Nor, should real party in interest be permitted to avail itself of California law on the alter ego issue against Canadian nationals with which it has no contractual privity or relationship with as Canadian law applies such standards in a vastly different manner.

Indeed, the competent evidence submitted on the record before this court indicated the following of corporate formalities by defendants herein, a lack of ownership by petitioner Howsam in the subject production company defendants, segregated finances by defendants and adherence to corporate records, inter alia. There was an utter failure by the real party in interest to prove by a preponderance of admissible evidence that these Canadian petitioners who have no contractual privity with the real party in interest in this action can be found to be alter egos of their co-defendants herein for purposes of establishing jurisdiction over them. Petitioners respectfully request that a writ of mandate to require the respondent court to enter its order quashing the service of summons or staying or dismissing the action or alternatively, request that a writ of prohibition issue to prevent further

proceedings following this improper denial of petitioner's motion to quash.

V. A WRIT OF MANDATE AND OR PROHIBITION IS ALSO WARRANTED UNDER A TRADITIONAL FORUM *NON CONVENIENS* ANALYSIS.

In *Stangvik v. Shiley, Inc.*, the California Supreme Court provided a test to use when determining whether to grant a motion based on forum *non conveniens*. First, a court must determine whether an alternative forum is a "suitable" place for trial. If it is, the next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California. *Stangvik v. Shiley Inc.*, 54 Cal. 3d 744, 751 (1991), C.C.P. § 410.30. Under this analysis, this motion should be granted.

A. Canada Is A "Suitable" Forum.

In determining whether to grant a motion based on forum *non conveniens*, a court must first determine whether the alternative forum is a "suitable" place for trial. Here, Canada is a suitable place for trial of the real party in interest's claims. Real party in interest does not dispute that it could litigate its claims against Mr. Howsam and GFTI for breach of contract, an accounting, fraud and an account stated in Canadian courts (such as those located in Toronto).

The real party in interest claims that this motion must be denied because Adam Benecke and Michele Glockler (who are tangential defendants) are not subject to personal jurisdiction in Canada. Based on real party in interest's agency theory, real party in interest would

presumably have jurisdiction over all agents assuming it could prove the existence of such agency. Nor did real party in interest provide any evidence for its supposition. Indeed, such position is not the law. Rather, the "primary" defendants must be subject to personal jurisdiction in Canada. In cases involving a large number of defendants, such as the present one, courts have held that "it is unreasonable to expect the moving defendant to prove *all* defendants are subject to jurisdiction in a particular alternative forum." *Hansen v. Owens-Corning Fiberglass Corp.* (1996) 51 Cal.App.4th 753, 759. [stating case law neither "states or implies all defendants must be subject to jurisdiction in an alternative forum before an order staying an action can be affirmed"]; *see also* (2000) 13 *Transnational Law* 175, 217.

B. The Private Factors Favor Litigation In Canada.

Real party in interest failed to dispute the fact that it would be extremely inconvenient and unreasonable to require Mr. Howsam and GFTI to defend this action in a Los Angeles Court, since most of their evidence, documents and witnesses needed for a proper defense are in Canada. (*Credit Lyonnais Bank Nederland, NV v. Manatt Phelps* (1988) 202 Cal. App. 3d 1424, 1437). Furthermore, real party in interest simply ignored the fact that at least twenty (20) percipient Canadian witnesses were identified by Mr. Howsam who are not subject to the subpoena power of California. The sheer number of important and percipient witnesses identified above point to the inescapable conclusion that the private factors militate in favor of staying or dismissing this California action.

In contrast real party in interest merely listed fifteen (15) individuals located in Los Angeles County, without indicating their position or the subject of their testimony. Therefore, it was impossible for the trial court to discern if these witnesses would be important, or even necessary for real party in interest's claims. For this reason, it is undisputed that the majority of percipient witnesses reside in Canada, and strongly tilted the private factors in favor of the moving parties.

C. The Public Factors.

Real party in interest previously argued that California courts have a strong public interest in providing a forum for California residents. Nor, is real party in interest even a California resident or corporation incidentally. Notwithstanding, the residency of the plaintiff is not determinative when making a *non conveniens* analysis. A court is permitted to exercise its discretion to dismiss an action on inconvenient forum grounds, even though the action may involve a California plaintiff. *Klein v. Superior Court* (1988) 197 Cal.App.3d 1217, 1223; *Credit Lyonnais Bank* at 1434.

In turn, California courts do not automatically defer to a resident plaintiff's decision to sue in California. For instance, in *Dendy v. MGM Grand Hotels, Inc.* (1982) 137 Cal.App.3d 457, the trial court stayed a lawsuit filed in California by San Diego residents arising out of the MGM Grand Hotel fire in Las Vegas. The Court of Appeal affirmed, allowing the litigation to proceed instead in Nevada. (*See also Archibald v. Cinerama Hotels* (1976) 15 Cal.3d 853, 860 ["the trial court retains a flexible power to stay actions by true California residents when it finds that

the foreign forum is preferable"]; *Hansen v. Owens-Corning Fiberglas Corp.* (1996) 51 Cal.App.4th 753 [California court has the power to stay an action for forum non conveniens even if the sole plaintiff is a California resident]; *Century Indemnity Co. v. Bank of America* (1997) 58 Cal.App.4th 408 [action by California resident insurer stayed pending litigation in Hawaii].

This is a case where the public interest factors are significant for Canadian courts. That is because the motion picture industry is also an important industry in Canada, especially Toronto, which is considered Canada's entertainment capital. Conversely, California has little interest in a dispute involving a Michigan plaintiff, various international distributors, and numerous Canadian defendants who made and produced motion pictures in Canada with Canadians.

CONCLUSION.

For the reasons set forth herein, specially appearing Petitioners Greenlight Film & Television Inc. and Gary Howsam, a Canadian corporation and a Canadian national, respectfully request this court to grant extraordinary writ relief as prayed and issue a writ of mandate pursuant to C.C.P. Sec. 415.10(c) to require the respondent court to enter its order quashing the service of summons or staying or dismissing the action. Alternatively, petitioners request that a writ of prohibition issue to prevent further proceedings following this improper denial of petitioner's motion to quash or staying or dismissing the action.

Dated: January 3, 2005

COSTA, ABRAMS & COATE, LLP

By: /s/ Charles M. Coate
Charles M. Coate
Attorneys For Petitioners
Greenlight Film &
Television, Inc. and
Gary Howsam

CERTIFICATE OF WORD COUNT

Pursuant to Cal. Rule of Court, rule 14(c)(1), 56(b)(6), the text of this petition consists of 7947 words as counted by the Microsoft Word version 2000 word-processing program used to generate this petition.

Dated: January 3, 2005

COSTA, ABRAMS & COATE, LLP

By: /s/ Charles M. Coate
Charles M. Coate
Attorneys For Petitioners
Greenlight Film &
Television, Inc. and
Gary Howsam

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1221 Second Street, Third Floor, Santa Monica, California 90401.

On January 6, 2005, I served the foregoing document described as on the interested parties in this action by placing a copy thereof enclosed in a sealed envelope as follows:

PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES; SUPPORTING EXHIBITS

[X] (**BY MAIL**) I deposited such envelope in the mail at Santa Monica, California. The envelope was mailed with postage fully prepaid. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

[ ] (**BY PERSONAL SERVICE/MESSENGER**) I caused such envelope to be delivered by hand by messenger Service to the offices of the addressee(s).

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Attn: Writ Dept
For: The Hon. Andria K. Richey
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Los Angeles, California 90012 (petition only)

[ ] **(BY TELEFAX)** I caused such document to be transmitted via telefax to the offices of the addressee(s), telefax number:

[ ] **(BY FEDERAL EXPRESS)** I delivered such envelope on the interested party below by placing a true copy thereof in a sealed Federal Express envelope and by placing said envelope for overnight delivery in a box or other facility regularly maintained by Federal Express to receive documents, with said envelope

[X] **(STATE)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made

Executed on January 6, 2005, at Santa Monica, California.

/s/ [Illegible]
Adam Us

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

COMERICA BANK, a Michigan Banking Corporation, Plaintiff, vs. GARY HOWSAM, an individual; GFT ENTERTAINMENT, INC., an Ontario corporation, also known as GFTE, Inc., and successor to GREENLIGHT FILM AND TELEVISION, INC. D/B/A GFT ENTERTAINMENT, an Ontario Corporation; GFT CIRCLE FILMS, INC., an Ontario Corporation; ROAD RAGE FILMS, INC., a Corporation of unknown origin; JANUS PRODUCTIONS, INC., a Quebec Corporation; GFT GOING BACK FILMS, INC.,	Case No.: BC 316406 [The Honorable Andria K. Richey] **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS MOTION TO QUASH SERVICE OF SUMMONS FOR LACK OF PERSONAL JURISDICTION [C.C.P. § 418.10]** **[SERVED AND FILED CONCURRENTLY WITH DECLARATION OF GARY HOWSAM]** [Complaint Filed: June 1, 2004] Date November 17, 2004 Time: 8:30 a.m. Dept. 31

an Ontario Corporation; GFT/REDWOOD KOTN FILMS, INC., a British Columbia Corporation; GFT/REDWOOD IGNITION FILMS, INC., a British Columbia Corporation; ADAM BENECKE, an individual; MICHEL GLOCKLER, an individual; and DOES 1 Through 100, inclusive, Defendants.	Discovery Cut-off: None Motion Cut-off: None Trial Date: None

(Filed Oct. 27, 2004)

I.

INTRODUCTION

Defendant Greenlight Film & Television Inc. is a Canadian corporation formed in 1997 in the province of Ontario, Canada. Its principal place of business is in Toronto, Canada. Defendant Gary Howsam is a Canadian citizen residing in Toronto, Canada and is the President of Greenlight Film & Television Inc. Neither Defendant conducts any business in California and neither entity has ever had the wide ranging, substantial, continuous and systematic contacts necessary to confer general jurisdiction. Nor, has either Defendant entered into any loan or interparty contract with the Michigan Plaintiff upon which Plaintiff bases its claims In addition, neither Defendant has minimum contacts with California sufficient to support a finding of specific jurisdiction. Thus, this out of state Plaintiff cannot meet its burden of establishing any purposeful availment by these foreign Defendants of the benefits of California law, much less, the requisite

substantial nexus between this Michigan Plaintiff's claims and the foreign Defendants' non existent activities in California. Moreover, at least *twenty* (20) third party witnesses to relevant events reside in Canada. Accordingly, specially appearing Defendants Motion to Quash for lack of personal jurisdiction should be granted in its entirety.

II.

STATEMENT OF FACTS

Gary Howsam is an individual over 18 years of age and is a citizen of the province of Ontario, Canada residing in Toronto Canada. He is the President of Greenlight Film & Television Inc. ("GFTI") a corporation existing under the laws of Ontario, Canada which maintains its principal place of business at 124 Merton Street, Suite 407, Toronto, Ontario M4S 2Z2. (Declaration of Gary Howsam at P 2, ¶ 2)

GFTI is not now and has never been qualified to do business in the state of California. (Declaration of Gary Howsam at P 2, ¶ 3)

None of GFTI's officers or directors, including Mr. Howsam, reside or are domiciled in the state of California. (Declaration of Gary Howsam at P 2, ¶ 4).

GFTI has no employees, residing or domiciled in California. (Declaration of Gary Howsam at P 2, ¶ 5). GFTI has no branch office or comparable facilities in California, and has no telephone listings or mailing addresses in California. (Declaration of Gary Howsam at P 2, ¶ 6). Neither GFTI nor Mr. Howsam maintain any bank accounts or other tangible personal or real property in the

State of California. (Declaration of Gary Howsam at P 2, ¶ 7).

GFTI does not direct any of its advertising specifically toward California residents nor does it advertise in publications that are directed primarily toward California residents. (Declaration of Gary Howsam at P 2, ¶ 8).

No meetings of GFTI's board of directors or shareholders have been held in California; none of its officers or directors have attended business conferences in such capacities within the state of California. (Declaration of Gary Howsam at P 2, ¶ 9).

At no time has Mr. Howsam or GFTI ever entered into any of the loan or interparty contracts which form the basis of Plaintiff's claims, nor has Mr. Howsam or GFTI ever executed an agreement with Plaintiff concerning the loaning of any money by Plaintiff to Mr. Howsam individually. Nor has Mr. Howsam individually or GFTI ever requested that Plaintiff loan money to Mr. Howsam individually or on behalf of GFTI, (Declaration of Gary Howsam at P 2, ¶ 10).

Further, it would be unreasonable to require Defendants GFTI and Mr. Howsam to defend this action in courts within California for the following reasons:

a. It would be unduly burdensome to require GFTI and Mr. Howsam to defend this action in the state of California as neither GFTI or Mr. Howsam have undertaken steps to purposefully avail themselves of the jurisdiction of the state of California;

b. A proper alternative forum for this dispute readily exists in Ontario, Canada;

c. Ontario, Canada will be the most efficient forum to resolve this dispute as at least 20 witnesses concerning the alleged obligation to Plaintiff are within the jurisdiction of Ontario, Canada;

d. California has little interest in a dispute involving the alleged non-payment of film distribution obligations between a Michigan Plaintiff and other Canadian Defendants. (Declaration of Gary Howsam at P 2 and P 3, ¶ 11).

The following are names and addresses of all persons known by Defendants herein to be percipient witnesses to any of the matters raised in the pleadings in this action and the matters upon which they are expected to testify:

a. Gary Howsam resides in Toronto, Ontario, Canada and will testify to the matters set forth in his declaration on his own behalf on behalf of GFTI;

b. Greenlight Film and Television Inc. is a Toronto, Ontario, Canada Corporation and it expected to testify to the matters to which its employees are percipient witnesses;

c. Plaintiff is a corporation existing under the laws of the State of Michigan. It is unknown what Plaintiff will testify to. (Declaration of Gary Howsam at P 3, ¶ 12).

Further, the interests of justice and the convenience of the parties and witnesses would be served by transferring this action to Ontario, Canada for the following reasons:

a. It would be burdensome and inconvenient for the majority of the witnesses set forth above to attend a trial in California because of the

expense of travel away from their business and other pursuits.

b. It would not be possible to subpoena at least *twenty (20)* third parties based in Canada for trial in California; while they are subject to process in Ontario, Canada to which transfer is sought.

c. All of the books and records of GFTI and Mr. Howsam and presumably third parties based in Canada such as Co-Defendants herein are primarily located in Ontario, Canada in which transfer is sought.

d. Finally, a transfer will serve the interests of judicial economy; will prevent a waste of time and money; and Ontario, Canada presents a forum with relevant ease of access to proof as well as the availability of compulsory process regarding conduct to have alleged to have occurred in this case. (Declaration of Gary Howsam at P 3, ¶ 13).

III.

THERE IS NO BASIS FOR ANY ASSERTION OF PERSONAL JURISDICTION AGAINST DEFENDANTS GREENLIGHT FILM & TELEVISION INC., A CANADIAN CORPORATION AND GARY HOWSAM, A CANADIAN NATIONAL.

The extent to which a California court can exercise personal jurisdiction over a defendant depends on the nature and quality of that defendant's "contacts" with the state. As the California Supreme Court stated in *Vons Companies, Inc. v. Seabest Foods, Inc.*, 14 Cal. 4th 434 (1996):

> Personal jurisdiction may be either general or specific. A non-resident defendant may be subject to the general jurisdiction of the forum if his or her contacts in the forum state are 'substantial . . . continuous and systematic.' . . . If the non-resident defendant does not have substantial and systematic contacts in the forum sufficient to establish general jurisdiction, he or she still may be subject to the specific jurisdiction of the forum, if the defendant has purposefully availed himself or herself of forum benefits (citation omitted) and the 'controversy is related to or arises out of a defendant's contacts with the forum.' (citations omitted)

Id. at 445-446

Where as here, personal jurisdiction "is challenged by a non-resident defendant the burden of proof is upon the Plaintiff to demonstrate that 'minimum contacts' exist between defendant and the forum state to justify imposition of personal jurisdiction." *Shearer v. Sup. ior Court* 70 Cal. App. 3d. 424, 430 (1977). Plaintiff must demonstrate "by a preponderance of the evidence that all necessary jurisdictional criteria are met." An unverified complaint may *not* be considered as an affidavit supplying necessary facts. *Ziller Elec. Lab. GmbH v. Superior Court*, 206 Cal. App. 3d 1222, 1232-33 (1988). For the reasons set forth below, the Michigan Plaintiff in this action will not be able to meet this burden with respect to either general jurisdiction or special jurisdiction.

A. This Court Does Not Have General Jurisdiction Over Greenlight Film & Television, Inc., and Gary Howsam.

In *Cornelison v. Chaney*, 16 Cal. 3d 143 (1976), the California Supreme Court cited *Perkins & Koninklijke L.M. v. Superior Court*, 107 Cal. App. 2d. 495 (1951), as illustrative of "the type of activity which has been held sufficient for the exercise of general jurisdiction." In *Perkins*, the Defendant was a Dutch airline which had moved all of its administrative functions into California. It had employed some thirty local employees, had made substantial purchases of airplanes in California, and had other local business operations in California. The Court held these activities were sufficient for general jurisdiction. *Id.* At 148-149.

In this case, it is clear that Greenlight Film & Television Inc. and Gary Howsam are not subject to this Court's general jurisdiction as they never engage in sufficiently wide ranging, continuous and systematic economic activities in California. As set forth in the declaration of Gary Howsam, Greenlight Film & Television Inc.:

> Does not manufacture or sell products in California;
>
> Does not own or maintain offices, plants, or other facilities in California;
>
> Does not have employees based in California;
>
> Does not maintain bank accounts in California;
>
> Does not pay taxes in California;
>
> Is not qualified, licensed, or registered to do business in California;

Does not have any agent for service of process in California;

Does not advertise in California.

Nor, does Gary Howsam individually have any such contact. In short, there simply are no wide-ranging continuing and systematic contacts, by these Defendants with California. Accordingly, this Court does not have general jurisdiction over Greenlight Film & Television Inc. or Gary Howsam. Correspondingly, the instant motion should be granted in its entirety.

B. Plaintiff Cannot Meet Its Burden Of Establishing That Greenlight Film & Television Inc. And Gary Howsam Have Minimum Contacts With California Sufficient to Support A Finding of Specific Jurisdiction.

Three criteria must be established in order for this Court to exercise specific jurisdiction under the so-called "minimum contacts" doctrine. First, Plaintiff must show that Greenlight Film & Television Inc. and Gary Howsam "[have] purposefully availed [themselves] of forum benefits . . . " *Shearer v. Superior Court*, 70 Cal. App. 3d. 424, 430 (1977); *Vons Companies, Inc. v. Seabest Foods, Inc., supra*, 14 Cal. 4th at 446. Second, Plaintiff must show that its claim against Greenlight Film & Television Inc. and Gary Howsam "is related to 'or arises out of Green Film & Television Inc. and Gary Howsam's] contacts with the forum". *Id.* As set forth above, Plaintiff bears the burden of proof on these first two criteria: *Vons Companies, supra*, 14 Cal. 4th at 449. Indeed, Howsam's contacts with California as an individual are non existent. Such facts will not

support a finding of specific jurisdiction under California law. *Seagate Technology v. A.J. Kogyo Co.* (1990) 219 Cal. App. 3d 696, 700.

The third criterion – the reasonableness of requiring the Defendant to respond to a lawsuit in California – is only considered if Plaintiff established that the Defendant has minimum contacts with California. *See Vons Companies, supra*, 14 Cal. 4th at 449 ("Once facts showing minimum contacts with the forum state are established, however, it becomes a Defendant's burden to demonstrate that the exercise of jurisdiction would be unreasonable.") Even if Plaintiff could demonstrate that Plaintiff's claims in this action are somehow related to or arise out of Defendants' contacts with the forum, it would be unreasonable to exercise jurisdiction over them when Plaintiff's First Amended Complaint does not contain one contract between such parties with Plaintiff. In sum, it would be unfair and unreasonable for this Court to exercise personal jurisdiction over Defendants under these facts.

1. **Plaintiff Cannot Satisfy Its Burden Of Establishing That Greenlight Film & Television Inc., and Gary Howsam Have Purposefully Availed Themselves Of The Benefits Of California Law.**

As noted in the accompanying declaration of Gary Howsam, Defendants simply do not do any business in California. Plaintiff acknowledges that Greenlight Film & Television Inc. and Gary Howsam are not present in California and are based in Canada. Nor, does Plaintiff allege that Gary Howsam individually or GFTI ever entered into a contract with Plaintiff in California. Even assuming *arguendo* that Plaintiff has somehow alleged

such a contractual relationship in a breach of contract action, which the Court can judicially notice it cannot, it is clear that a non-resident defendant does not necessarily become subject to the specific jurisdiction of the forum state simply by entering into a contract with a resident of the forum. *Vons Companies, supra*, 14 Cal. 4th at 449, citing *Burger King v. Rudzewicz*, 471 U.S. 462 at 478 (1985). In *Burger King, supra*, the U.S. Supreme Court stated:

> If the question is whether an individual's contact with an out-of-state party **alone** can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it can not.

Id. at 478. Similarly, in *Sibley v. Superior Court of Los Angeles County*, 16 Cal. 3d 442 (1976), the Court held the fact that breach may have "caused an effect" in California is insufficient to confer specific jurisdiction over foreign defendant. *Id.* at 446.

In *Burger King*, the Supreme Court held that "mechanical" tests for personal jurisdiction had long been rejected in favor of a "highly realistic" approach considering all factors affecting the negotiation, execution, and performance of the contract "in determining whether the Defendant purposefully established minimum contacts with the forum." *Id.* at 478-479. Any such analysis here readily demonstrates the lack of purposeful availment of the benefits of California by Defendants herein. Specially appearing Defendants respectfully request that the instant Motion be granted in its entirety.

2. Even If Plaintiff Could Meet Its Burden Of Establishing Minimum Contacts, It Cannot Establish A Substantial Relationship Between Those Contacts And Plaintiff's Claims.

Even if this Court finds that Defendants had sufficient contacts with California such that it could be said the Defendants "purposefully availed [themselves] of the privilege of conducting business in California or of the benefits and protections of California laws," *Sibley v. Superior Court of Los Angeles County, supra*, 16 Cal. 3d 442, 447 (1976), it is clear that there is no "substantial nexus between Plaintiffs causes of action and Defendant's activities in California." *Cornelison v. Chaney*, 16 Cal. 3d 143, 149 (1976). There simply is no "substantial nexus" between Plaintiff's claims and any activities of which it could be said that these Defendants sought to avail themselves of the privilege of conducting business in California or of the benefits and protections of California law.

As the U.S. Supreme Court has noted:

> This 'purposeful availment' requirement insures that a Defendant will not be hailed into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts [citations omitted] or of the 'unilateral activity of another party or a third person,' [citations omitted].

Burger King, supra, 471 U.S. at 475. In short, there is no substantial nexus between the subject loan and interparty agreements at issue here and any conceivable minimum contacts between these Canadian Defendants and California. Simply, neither Defendant is a signatory to any of the contracts upon which Plaintiff bases its claims. Such facts

simply cannot support any nexus, let alone a substantial one. The instant motion should be granted in its entirety.

3. It Would Be Inherently Unreasonable And Unfair For the Court To Exercise Personal Jurisdiction Over Greenlight Film & Television Inc., and Gary Howsam Given The Facts Of This Case.

Even assuming *arguendo* that Plaintiff can meet its dual burden of (1) establishing that Defendants have sufficient contacts with California and (2) that those contacts are sufficiently, related to Plaintiff's claims so as to confer specific jurisdiction, this Court should nevertheless decline to exercise jurisdiction because to do so would be inherently unreasonable and unfair given the facts of this case. As noted by the Court in *Burger King*, "minimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the Defendant has purposefully engaged in forum activities." *Id*, at 477-478.

The determination as to the reasonableness of the exercise of jurisdiction requires consideration of a number of factors including:

> [t]he relative availability of evidence and the burden of defense and prosecution in one place rather than another; the interest of the state in providing a forum for its residents or regulating the business involved; the ease of an alternative forum; the avoidance of a multiplicity of suits and conflicting adjudications; and the extent to which the cause of action arose out of Defendant's local activities. *Cornelison, supra*, 16 Cal. 3d at 150, citing *Fisher Governor Company v. Superior Court of San Francisco* 53 Cal. 2d 222 (1959).

Here none of these considerations support an assumption of jurisdiction in this case. Plaintiff's causes of action do not arise out of and are not related to any activities by these Defendants in this state. Rather, this action arises out of contracts to which Defendants herein are not parties. Based on the myriad of exhibits attached to Plaintiff's First Amended Complaint it is clear that no contractual relationship exists between this Michigan Plaintiff and these Canadian Defendants bringing this motion. Moreover, at least twenty witnesses to relevant events reside in Canada. Accordingly, the instant Motion to Quash should be granted in its entirety pursuant to C.C.P. Sec. 418.10.

IV.

CONCLUSION

For all of the above and foregoing reasons, Defendants Gary Howsam and Film & Television Inc. respectfully request that this Court decline jurisdiction over them in this action and grant the instant motion with prejudice.

Dated: October 27, 2004

Respectfully submitted,
Costa, Abrams & Coate, LLP

By: /s/ Charles M. Coate
CHARLES M. COATE
Attorneys for Specially Appearing Defendants Greenlight Film & Television Inc., a Canadian Corporation and Gary Howsam, an individual And Canadian National

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1221 Second Street, Third Floor, Santa Monica, California 90401.

On October 27, 2004, I served the foregoing document described as on the interested parties in this action by placing a copy thereof enclosed in a sealed envelope as follows:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS MOTION TO QUASH SERVICE OF SUMMONS FOR LACK OF PERSONAL JURISDICTION [C.C.P. §418.10]

[ ] **(BY MAIL)** I deposited such envelope in the mail at Santa Monica, California. The envelope was mailed with postage fully prepaid. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

[x] **(BY PERSONAL SERVICE/MESSENGER)** I caused such envelope to be delivered by hand by messenger Service to the offices of the addressee(s).

Michael Wachtell, Esq.
BUCHALTER, NEMER FIELDS & YOUNGER
601 S. Figueroa Street
Suite 2400
Los Angeles, CA 90017-5704

[ ] **(BY TELEFAX)** I caused such document to be transmitted via telefax to the offices of the addressee(s), telefax number:

[ ] **(Federal)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on October 27, 2004, at Santa Monica, California.

/s/ Charles M. Coate
Charles M. Coate

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 31 HON. ANDRIA K. RICHEY, JUDGE

COMERICA BANK, A MICHIGAN BANKING CORPORATION,	)	
PLAINTIFF,	)	
VS.	)	NO. BC316406
GARY HOWSAM, AN INDIVIDUAL, ET AL.,	)	
DEFENDANTS.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

WEDNESDAY, DECEMBER 15, 2004

APPEARANCES:

FOR PLAINTIFF: BUCHALTER, NEMER, FIELDS & YOUNGER
BY: ROBERT S. ADDISON, JR., ESQ.
BY: MICHAEL WACHTELL, ESQ.
BY: RONALD K. SITTLER, ESQ.
601 SOUTH FIGUEROA ST., SUITE 2400
LOS ANGELES, CALIFORNIA 90017

FOR DEFENDANT HOWSAM, GFTE: COSTA, ABRAMS & COATE LLP
BY: CHARLES M. COATE, ESQ.
1221 SECOND ST., THIRD FLOOR
SANTA MONICA, CALIFORNIA 90401

INGRID A. LAFRANCHI
OFFICIAL REPORTER
C.S.R. NO. 9120

FOR DEFENDANT: GFT CIRCLE FILMS, ROAD RAGE FILMS, JANUS PRODUCTIONS, GFT GOING BACKFILM, ET AL.	HAMRICK & EVANS LLP BY: A. RAYMOND HAMRICK, III, ESQ. 10 UNIVERSAL CITY PLAZA, SUITE 2200 UNIVERSAL CITY, CALIFORNIA 91608
FOR DEFENDANT: GFT ENTERTAINMENT	WILLIAMS & KILKOWSKI BY: JAMES M. KILKOWSKI, ESQ. 1900 AVENUE OF THE STARS, 25TH FLOOR LOS ANGELES, CALIFORNIA 90067
FOR DEFENDANT: MICHEL GLOCKLER	KAMANSKI & STRELTZER LLP BY:-DAM L. STRELTZER, ESQ. 10940 WILSHIRE BLVD., SUITE 600 LOS ANGELES, CALIFORNIA 90024
FOR DEFENDANT: ADAM BENNECKE	PLG GENERAL COUNSEL, INC. BY: JAMES R. ZATOLOKIN, ESQ. 6701 CENTER DRIVE WEST, SUITE 710 LOS ANGELES, CALIFORNIA 90045
[1] CASE NUMBER:	BC316406
CASE NAME:	COMERICA BANK VS. HOWSAM, ET AL.
LOS ANGELES, CALIFORNIA	DECEMBER 15, 2004
DEPARTMENT 31	HON. ANDRIA K. RICHEY, JUDGE

REPORTER: INGRID A. LAFRANCHI, CSR NO. 9120

TIME: 8:57 A.M.

APPEARANCES: (AS HERETOFORE NOTED)

THE COURT: LET'S CALL NO. 3, COMERICA, BC316406.

MORNING.

MR. WACHTELL: MORNING, YOUR HONOR. MICHAEL WACHTELL, RONALD SITTLER, AND ROBERT ADDISON OF BUCHALTER, NEMER, FIELDS & YOUNGER ON BEHALF OF COMERICA BANK, YOUR HONOR.

THE COURT: MORNING.

MR. COATE: MORNING, YOUR HONOR. CHARLES COATE OF COSTA, ABRAMS & COATE APPEARING ON BEHALF OF SPECIALLY APPEARING DEFENDANTS GARY HOWSAM AND GREENLIGHT FILM AND TELEVISION, INC.

THE COURT: GOOD MORNING.

MR. HAMRICK: MORNING, YOUR HONOR. A. RAYMOND HAMRICK, III, APPEARING ON BEHALF OF DEFENDANTS GFT CIRCLE FILMS, ROAD RAGE FILMS, JANUS PRODUCTIONS, GFT GOING BACK-FILMS, GFT HERESY FILMS, GFT/REDWOOD KOTN FILMS, AND GFT/REDWOOD IGNITION FILMS.

THE COURT: I'LL HAVE TO GIVE YOU A NICKNAME.

MR. HAMRICK: AKA.

MR. KILKOWSKI: MORNING, YOUR HONOR. JAMES KILKOWSKI FOR SPECIALLY APPEARING DEFENDANT GFTE ENTERTAINMENT, INC.

THE COURT: GOOD MORNING.

[2] MR. STRELTZER: YOUR HONOR, ADAM STRELTZER ON BEHALF OF DEFENDANTS MICHEL GLOCKLER.

THE COURT: GOOD MORNING.

MR. ZATOLOKIN: MORNING, YOUR HONOR. JAMES ZATOLOKIN OF PLG GENERAL COUNSEL APPEARING ON BEHALF OF THE DEFENDANT ADAM BENNECKE.

THE COURT: GREAT. I THINK EVERYBODY IS HERE.

MR. COATE: YES, YOUR HONOR.

THE COURT: I WILL ASK YOU FOLKS WHEN YOU SPEAK, SINCE I DON'T THINK MY REPORTER KNOWS YOU ALL YET, JUST IDENTIFY YOURSELF ONE MORE TIME FOR THE RECORD SO SHE GETS THE RIGHT NAME.

I WOULD LIKE TO START, IF I CAN, WITH THE GFT ENTERTAINMENT MOTION TO QUASH. I'VE GOT SOME QUESTIONS ABOUT THAT. I TRIED TO LET YOU ALL KNOW WHAT MY QUESTIONS WERE IN THE TENTATIVE. IF WE COULD START WITH THAT, I WOULD APPRECIATE IT.

MAYBE BEFORE WE START WITH THAT LET ME ASK YOU: I DON'T KNOW IF YOU FOLKS HAVE HAD TIME TO TALK ABOUT THE COURT'S SUGGESTION

THAT WE GET SOME FURTHER BRIEFING ON THE ARBITRATION MOTION.

HAVE YOU GUYS TALKED ABOUT THAT THIS MORNING?

MR. HAMRICK: WE HAVE NOT HAD A CHANCE TO TALK ABOUT THAT, YOUR HONOR.

THE COURT: WELL, IT WOULD BE MY SUGGESTION THAT WE DO THAT AND ARGUE THAT MOTION ON THE 29TH, IF YOU GUYS CAN DO THAT.

MR. WACHTELL: YOUR HONOR, I REQUEST TO HAVE YOUR HONOR [3] PUT THAT DATE TO A DATE OTHER THAN THAT WEEK BETWEEN CHRISTMAS AND NEW YEAR'S. A LOT OF PEOPLE ARE ON VACATION.

THE COURT: IN THAT CASE, MAYBE WHAT WE WILL DO IS ARGUE IT TODAY AND YOU CAN SUBMIT FURTHER BRIEFING AND THE MATTER WILL BE SUBMITTED AT THAT TIME.

MR. HAMRICK: YOUR HONOR, I AM COMFORTABLE WITH THE 29TH. WHATEVER YOUR PREFERENCE IS.

THE COURT: COUNSEL IS NOT AVAILABLE. I DON'T WANT TO FORCE HIM TO BE HERE, ALTHOUGH I THOUGHT YOU WERE GOING TO BE HERE FOR THE –

MR. WACHTELL: WE WILL COVER –

MR. ADDISON: WE WERE GOING TO HAVE AN ASSOCIATE COVER THE DEMURRER HEARING OF MICHEL GLOCKLER PRESENTLY SET FOR THE

29TH. WITH REGARD TO THESE OTHER ISSUES BEFORE THE COURT, THE ATTORNEYS THAT NEED TO BE HERE FOR THAT ARE GOING TO BE OUT OF TOWN.

THE COURT: OKAY. LET'S ARGUE IT TODAY THEN, AND I WILL ASK THAT YOU FILE SUPPLEMENTAL BRIEFS ON THESE TWO ISSUES IN ADDITION AND THE MATTER WILL THEN BE SUBMITTED AS SOON AS THOSE SUPPLEMENTAL BRIEFS ARE GOING TO BE FILED. THEY WILL HAVE TO BE FILED SOON, BEFORE THE 29TH SO I CAN RULE ON THAT DAY.

MR. WACHTELL: NO PROBLEM.

MR. ADDISON: THE TWO ISSUES, IS THAT THE ARBITRATION AS WELL AS THE GFT ISSUE?

THE COURT: NO. NO. JUST THE ARBITRATION. ALL I TRIED TO SAY IN THE TENTATIVE IS THAT I THOUGHT FURTHER BRIEFING ON THE ARBITRATION ISSUE ON THE QUESTIONS I HAVE OUTLINED FOR YOU [4] WOULD BE VERY HELPFUL. BUT WE CAN ARGUE IT TODAY, THEN YOU CAN JUST FILE YOUR SUPPLEMENTAL BRIEFS. WHY DON'T WE SAY YOU WILL FILE THEM BY THE 27TH. COURTESY COPIES NEED TO BE UP HERE, PLEASE, BY NOON THAT DAY.

MR. HAMRICK: FILE IT CONCURRENTLY, YOUR HONOR?

THE COURT: PLEASE. THE PROBLEM IS IF YOU FILE IT DOWNSTAIRS, SOMETIMES IT DOESN'T GET UP HERE UNTIL THE NEXT DAY. I REALLY WANT TO MAKE SURE I'VE HAD TIME TO READ IT.

IN ADDITION TO THE DEMURRER, I THINK MS. GLOCKLER HAS SOME KIND OF MOTION FOR STAY OR SOMETHING BASED ON HER ASSUMPTION THAT THE MATTERS ARE GOING TO BE ARBITRATED, SO WE CAN RESOLVE IT ALL THAT DAY.

LET'S GO TO GFT. I FORGET WHICH COUNSEL IT IS.

MR. KILKOWSKI: YOUR HONOR, I AM OBVIOUSLY COUNSEL FOR GFTE, AND WE AGREE WITH YOU THAT THERE IS NO CONTINUATION HERE. AS OBVIOUS FROM THE PAPERS, GREENLIGHT FILM AND TELEVISION HAS 34 FILMS. IT HAS OTHER BUSINESSES. IT CONTINUES TO OPERATE TO THIS DAY. IT'S GOT A MOVIE IN PRODUCTION RIGHT NOW. IT HAS AN INVESTMENT IN A MOVIE THAT IS BEING DISTRIBUTED BY SONY RIGHT NOW. IT DID NOT GO AWAY.

IN THAT REGARD, IT DISTINGUISHES – THE FACTS ARE DISTINGUISHED FROM THE OTHER CASES, FOR EXAMPLE, THE CONDOMINIUM CASE IN WHICH DAY ONE THEY RECALL ONE NAME AND THE NEXT DAY ALL THE ASSETS AND ALL OF THE BUSINESS RELATIONSHIPS AND EVERYTHING ELSE APPEAR IN SOMEONE ELSE'S NAME.

IN ADDITION TO THE FACT THAT THERE IS NO CONTINUATION, WE WOULD ALSO LIKE TO EMPHASIZE THE FACT THAT THERE IS NO FOLLOW-THROUGH OF THE OWNERSHIP. THE OWNERSHIP OF [5] GFT IS PEACE ARCH WHICH IS A PUBLICLY-TRADED COMPANY IN CANADA. PEACE ARCH OWNS NOTHING OF GREENLIGHT. SO YOU HAVE A 100 PERCENT OWNER OF GFT ENTERTAINMENT WHO IS

MAKING A MOTION AND IT HAS NO OWNERSHIP OF THE SUPPOSED PREDECESSOR OF WHICH IT IS NOW THE SUPPOSED SUCCESSOR. AND WE THINK BOTH OF THOSE TWO THINGS ARE NECESSARY.

I GUESS JUST TO SUMMARIZE AT THIS POINT, I READ THE OPPOSITION PAPERS AGAIN, AND THERE IS ONE PARAGRAPH THAT SEEMS TO HIGHLIGHT THE POSITION AND THAT IS ON PAGE 8 STARTING AT LINE 4 THROUGH LINE 10. IT'S A JUST SIX-LINE PRESENTATION.

EVERYTHING IN IT IS WRONG. THEY START OUT BY SAYING THAT HOWSAM AND GREENLIGHT OBTAINED LOANS FROM COMERICA ON FALSE PRETENSES. THEY CITE 14 AND 15. ABSOLUTELY NO EVIDENCE THAT HOWSAM HAD ANYTHING TO DO WITH IT. ABSOLUTELY NO EVIDENCE THAT GREENLIGHT HAD ANYTHING TO DO WITH IT.

SECOND, IF THE COURT WERE TO ABSOLVE GFT OF LIABILITY FOR GREENLIGHT, COMERICA'S REMEDY AGAINST GREENLIGHT AND HOWSAM WOULD BE EFFECTIVELY DESTROYED. HOWSAM IS THERE AND GREENLIGHT IS THERE. IT'S NOT TRUE.

FINALLY, IT SAYS GFT IS OBTAINING THE ECONOMIC BENEFIT OF THE VERY FILMS GREENLIGHT PRODUCED. NOT TRUE. GREENLIGHT STILL OWNS THE FILMS THAT THEY ARE COMPLAINING ABOUT. THERE HAS BEEN NO TRANSFER OF ANY ECONOMIC BENEFIT FROM GREENLIGHT TO GFT. SO NO EVIDENCE OF FRAUD. NO EVIDENCE OF TRANSFER OF ALL OF THE ASSETS. NO EVIDENCE OF ECONOMIC BENEFIT. IT'S THEIR BURDEN ON

THIS MOTION TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT ALL OF THOSE THINGS ARE TRUE, AT LEAST FOR PURPOSES OF THE JURISDICTIONAL MOTION, AND [6] THEY FAILED TO DO SO.

THANK YOU.

THE COURT: THANK YOU.

PLAINTIFF.

MR. ADDISON: YOUR HONOR, MAY I BE HEARD?

THE COURT: YES.

MR. ADDISON: ROBERT ADDISON ON BEHALF OF COMERICA BANK.

YOUR HONOR, THERE ARE TWO BASES THAT WE HAVE ALLEGED FOR THE SUCCESSOR – I MEAN, FOR THE SUCCESSOR LIABILITY OF GFT. ONE IS THE CONTINUITY EXCEPTION TO THE RULE, AND THE OTHER IS THE FRAUD EXCEPTION. THE CONTINUITY EXCEPTION HAS TWO REQUIREMENTS. NO ADEQUATE CONSIDERATION GIVEN FOR THE PREDECESSOR CORPORATION'S ASSETS. ONE OR MORE PERSONS WERE OFFICERS, DIRECTORS, OR STOCKHOLDERS OF BOTH COMPANIES. THAT IS IN THE *MCCLELLAN* CASE.

GARY HOWSAM IS AN OFFICER OF EVERY COMPANY AT ISSUE IN THIS CASE. AND HE – AS STATED IN HIS OWN DECLARATION, PEACE ARCH ACQUIRED GFT WHICH ACQUIRED FROM GREENLIGHT 100 PERCENT OF THE STOCK OF EACH OF THE FIVE

PRODUCTION COMPANIES THAT WERE IN THE PROCESS OF MAKING MOVIES FOR ONE DOLLAR.

YOUR HONOR, ALSO, BOTH COMPANIES OPERATED OUT OF THE SAME ADDRESS. GFT'S WEB SITE HAD LISTED ALL OF GREENLIGHT'S FILMS INCLUDING THE FILMS AT ISSUE IN THIS CASE. AND IMPORTANTLY, GFT WAS FORMED AFTER THE DISCOVERY OF THE FRAUD IN THIS CASE.

AND, YOUR HONOR, WE SUBMIT THAT THERE IS REALLY NO DIFFERENCE IN HAVING A PREDECESSOR COMPANY THAT A WRONGDOER WRAPS UP AND THEN FORMS A NEW COMPANY TO CONTINUE THE BUSINESS [7] AND KEEPING THE PREDECESSOR COMPANY IN OPERATION BUT REALLY DOING THE LION'S SHARE OF ALL THIS NEW BUSINESS WITH A NEW COMPANY AS PART OF A SHAM TO AVOID LIABILITY.

WHEN GARY HOWSAM REALIZED HE WAS FACING UP TO $20 MILLION IN EXPOSURE, HE MOVED QUICKLY TO FORM A NEW COMPANY, JOIN UP WITH ANOTHER PRODUCTION COMPANY, AND TRY AND BUILD AS BIG A SHIELD AS HE COULD BETWEEN HIMSELF AND THE LIABILITY TO COMERICA.

THE COURT: I GUESS THAT MEANS THAT YOU ARE DISCOUNTING THE REPLY DECLARATIONS COMPLETELY. I MEAN, I GUESS I AM HAVING TROUBLE UNDERSTANDING WHERE THE EVIDENCE IS FOR YOUR POSITION AS TO GFT. I AM HAVING TROUBLE.

MR. ADDISON: THE EVIDENCE WE HAVE IS HOWSAM IS AN OFFICER OF ALL THE COMPANIES,

THAT HE WAS A PRESIDENT OF GREENLIGHT, THAT THE COMPANIES OPERATE OUT OF THE SAME ADDRESS, THAT ON GFT'S WEB SITE THEY WERE LISTING GREENLIGHT'S FILMS. IF ITS TRULY A NEW BUSINESS, WHY ARE GREENLIGHT'S FILMS LISTED ON GFT'S WEB SITE AS COMPLETED PRODUCTIONS?

THE COURT: HOPEFULLY, THEY WILL TELL US.

MR. ADDISON: AND, YOUR HONOR, AT A MINIMUM WE SHOULD BE ENTITLED TO SOME DISCOVERY AS TO THE VERY DETAILS OF THE TRANSACTIONS OF THE FORMATION OF THE NEW COMPANY, WHAT ASSETS WERE TRANSFERRED, AND ESPECIALLY THE ALLEGATIONS SET FORTH IN THE DECLARATIONS OF WHICH WE HAD NO OPPORTUNITY TO CONDUCT DISCOVERY ON.

THE COURT: TELL ME WHAT DISCOVERY PRECISELY YOU WOULD SEEK.

MR. ADDISON: WE WOULD SEEK SOME DISCOVERY OF THE ASSETS [8] OF GREENLIGHT AND AN ACCOUNTING OF THEM AS THEY EXISTED BEFORE THE CREATION OF GFT AND AFTER.

THE COURT: WHAT DO YOU MEAN "AN ACCOUNTING"?

MR. ADDISON: WELL, WE WOULD LIKE TO SEE HOW MUCH OF THE ASSETS OF GREENLIGHT WERE TRANSFERRED TO GFT, IF ANY OF THEM WERE DISSIPATED OR, YOU KNOW, IF GREENLIGHT LOST A SIGNIFICANT AMOUNT OF ASSETS AROUND THE SAME TIME AS THE FORMATION OF GFT WHICH WOULD SUPPORT OUR CLAIM THAT GARY

HOWSAM WAS ESSENTIALLY TRYING TO ELIMINATE OR BREAK THAT LINK BETWEEN HIMSELF AND HIS NEW COMPANY AND THE LIABILITY OF HIS OLD COMPANY THAT HE CREATED.

MR. WACHTELL: MICHAEL WACHTELL, YOUR HONOR.

THE ISSUE IS GOING TO BE WHETHER OR NOT THE TRANSFER OF THE ASSETS CONSTITUTED A FRAUDULENT CONVEYANCE IN AN EFFORT TO PRECLUDE CREDITORS OF THESE ENTITIES FROM COLLECTING –

THE COURT: WELL, THE ISSUE FOR THIS MOTION DOESN'T HAVE TO BE THAT BROAD, DOES IT? I MEAN, THE DISCOVERY IF YOU GET ANY FOR THIS MOTION HAS GOT TO BE QUICK AND LIMITED. RIGHT? WE AGREE ON THAT?

MR. WACHTELL: THE LAW ALLOWS DISCOVERY AS TO JURISDICTIONAL ISSUES ONLY.

THE COURT: RIGHT.

OKAY. ANY RESPONSE FROM DEFENSE?

MR. COATE: YES.

THE COURT: MOVING PARTY, PLEASE.

MR. KILKOWSKI: YOUR HONOR, MR. ADDISON JUST THROWS TERMS AROUND. HE SAYS HOWSAM IS A NEW COMPANY. GFT IS NOT HOWSAM'S NEW COMPANY. IT'S OWNED BY A PUBLIC COMPANY IN CANADA, [9] PEACE ARCH. PEACE ARCH HAS LITERALLY HUNDREDS OF SHAREHOLDERS, SO IT IS NOT HOWSAM'S NEW COMPANY.

THEY KEEP, AS I SAID IN MY PAPERS, STAMPING THEIR FEET AND REPEATING THE ISSUE. IT'S NOT HIS COMPANY.

THEY SAID THAT THE LION'S SHARE OF BUSINESS WAS TRANSFERRED TO THE NEW COMPANY. THERE ARE 34 FILMS IN THE OLD COMPANY. THERE ARE FIVE FILMS IN THE NEW COMPANY, ALL OF WHICH ARE UNDER WATER. THEY HAVEN'T MADE A PROFIT. HOW IS FIVE THE LION'S SHARE OF 39? IT ISN'T.

AND IN ADDITION TO THE FILM BUSINESS, GREENLIGHT HAS OTHER BUSINESSES. THEY HAVE A FINANCING BUSINESS. THEY HAVE A DISTRIBUTION BUSINESS. THEY ARE IN ACTIVE BUSINESS TODAY. AND THERE IS NO SHOWING OF A TRANSFER OF ANY ASSETS OF ANY VALUE.

AND THE REASON, OF COURSE, YOUR HONOR, THAT WE BROUGHT THIS TO YOUR ATTENTION, THE FIVE FILMS THAT WERE, IN FACT, TRANSFERRED, IS BECAUSE WE THOUGHT IT WAS NECESSARY IN TERMS OF MEETING OUR OBLIGATION OF CANADA TO THE COURT. BUT THOSE FILMS WEREN'T FINANCED WITH COMERICA'S MONEY. THOSE FILMS DIDN'T HAVE COMERICA LOANS. THEY DIDN'T HAVE ANYTHING TO DO WITH COMERICA.

AND ONE THING THAT HASN'T BEEN MENTIONED, WHICH WE MENTIONED IN OUR PAPERS A NUMBER OF TIMES, IS THAT GFTE WASN'T EVEN FORMED AT THE TIME ALL OF THIS STUFF TOOK PLACE.

SO I GUESS THE LAST THING I WOULD LIKE TO SAY, YOUR HONOR, IS THAT IF THEY WANT TO SUE FOR FRAUDULENT TRANSFER WHEN THEY'VE GOT SOME FACTS, LET THEM DO IT. BUT NOW IS NOT THE TIME.

[10] THE LAST THING IS WITH RESPECT TO THE FRAUD ISSUE, PERHAPS IN MY OPINION THE MOST TELLING FACTS WHICH WE OFFERED YOU IN THE DECLARATION ARE THESE: 28 FILMS HAVE BEEN FINANCED BY GREENLIGHT. TEN OF THEM WITH COMERICA, 18 WITH OTHER LENDERS. NO PROBLEMS WHATSOEVER. SIX FILMS WHICH ARE THE FILMS AT ISSUE IN THIS CASE WERE FINANCED BY COMERICA, AND SOME OF THE CONTRACTS WHICH CAME IN CAME IN THROUGH US. AND SOME OF THEM CAME IN THROUGH THE FOREIGN SALES AGENT. THERE ARE NO PROBLEMS WHATSOEVER WITH ANYTHING THAT CAME IN THROUGH US. THE ONLY PROBLEMS THAT EXIST ARE CONTRACTS THAT CAME IN THROUGH THE FOREIGN SALES AGENT.

THERE IS A CONCLUSION THERE WHICH I DON'T WANT TO DRAW FOR PURPOSES OF THEIR OTHER CASE, BUT IT SEEMS TO ME THAT THE EVIDENCE IS PERFECTLY CLEAR THAT TO THE EXTENT THESE CONTRACTS ARE PROBLEMATIC THEY ORIGINATED OUT OF FOREIGN SALES AGENTS, NOT US. THEY PUT US IN HOT WATER. THEIR OWN DECLARATIONS SAY THAT HOWSAM SAID, THIS PUTS US IN HOT WATER." WHY? BECAUSE THE FULL BUDGETS OF THE FILMS WERE FINANCED, AND ALL OF A SUDDEN LARGE PIECES OF THEIR FOREIGN DISTRIBUTION SALES DISAPPEAR WHICH MEANS THAT THE

PRODUCTION COMPANIES STILL HAVE TO PAY. THERE HASN'T BEEN ANY RELIEF OF LIABILITY HERE.

HOWSAM AND THE COMPANIES, ALL OF WHICH ARE SEPARATE AND INDEPENDENT AND ALL OF WHICH WERE THE BORROWERS, WERE ALL SPE'S AT COMERICA'S INSISTENCE, STILL HAVE TO PAY US OFF. IT WOULD BE STUPID FOR US TO MAKE MOVIES WITH FORGED AGREEMENTS AND THEN STILL HAVE TO PAY THEM BACK. IT DOESN'T MAKE ANY SENSE.

[11] ONCE AGAIN, TO SUMMARIZE, NO EVIDENCE OF FRAUD. NO EVIDENCE OF ANY FRAUDULENT TRANSFER. AND THEY DON'T NEED DISCOVERY BECAUSE NO DISCOVERY IN THE WORLD IS GOING TO CHANGE THE FACT THAT PEACE ARCH OWNS 100 PERCENT OF GFT AND IT OWNS NOTHING OF GREENLIGHT.

THE COURT: DO YOU HAVE ANY RESPONSE TO THE ISSUE OF THE WEB SITES?

MR. KILKOWSKI: YES, YOUR HONOR.

THOSE FILMS WERE LISTED ON THAT WEB SITE AS GREENLIGHT FILMS. THEY ARE NOT ON GFT FILMS. AND I HAVE THE UNDERSTANDING THAT IT'S KIND OF A BRANDING PROCESS. YOU WANT TO MAKE YOURSELF LOOK LIKE A COMPANY THAT HAS MADE LOTS OF MOVIES AND AS A RESULT YOU HAVE MOVIES FOR GFTE. AND THERE IS AN ASSOCIATION BETWEEN GFTE AND GREENLIGHT BECAUSE THE MOVIES THAT GREENLIGHT – SORRY – THAT GFTE MADE HAD ORIGINALLY BEEN MADE

THROUGH THE PRINCIPAL PHOTOGRAPHY PHASE BY GREENLIGHT AND THEY WERE TRANSFERRED OVER AND SO THE MOVIES THAT GFTE MADE HAD NOTHING TO DO WITH THE MOVIES THAT GREENLIGHT MADE.

THE COURT: IF THAT'S THE, CASE, IT'S PERPLEXING THAT THEY WOULD BE REMOVED FROM THE WEB SITE IT DOESN'T REALLY MAKE ANY SENSE.

MR. KILKOWSKI: I THINK IT'S JUST A QUESTION OF SINCE IT CAME UP IN THIS CASE, IT BRINGS CLARITY TO THE ORGANIZATION BUT BY THE WAY, YOUR HONOR, THAT WEB SITE INFORMATION ISN'T ADMISSIBLE, BY THE WAY.

THE COURT: I READ YOUR OBJECTIONS.

MR. KILKOWSKI: THERE IS NO FOUNDATION FOR IT. WE DON'T [12] KNOW WHO WROTE IT.

THE COURT: OKAY.

MR. KILKOWSKI: IT'S JUST A VERY SLIM READ BASED ON THE SUBSTANTIAL DEMONSTRATION OF THE NO-FRAUD POINT AND THE NO-CONTINUATION POINT.

THE COURT: ANYTHING FURTHER FROM PLAINTIFF?

MR. ADDISON: TWO QUICK POINTS, YOUR HONOR.

IN RESPONSE TO GFT'S CLAIM THAT GFT IS NOT HOWSAM'S NEW COMPANY, THAT IT'S OWNED BY

PEACE ARCH, HOWSAM IS A CEO OF PEACE ARCH AND, YOU KNOW, IT IS HIS NEW COMPANY.

THE OTHER ISSUE IS WITH REGARD TO DISCOVERY NOT ONLY ON FRAUDULENT CONVEYANCE, BUT WE ALSO WOULD CONDUCT DISCOVERY ON THE CONTINUITY. YOU KNOW, GFT STATES THAT THERE WERE – YOU KNOW, THERE ARE STILL A SIGNIFICANT NUMBER OF MOVIES BEING PRODUCED BY GREENLIGHT. WE ARE UNAWARE OF THAT. COUNSEL DID NOT EXPLAIN THAT TO ME ON THE PHONE WHEN I HAD A CONVERSATION WITH HIM. AND WE WOULD BE ENTITLED TO DISCOVERY TO DETERMINE HOW MUCH OF GREENLIGHT'S OLD BUSINESS IS NOW BEING DONE BY GFT.

THE COURT: OKAY. THAT ONE WILL BE SUBMITTED.

LET'S TURN TO THE PETITION TO COMPEL ARBITRATION AND I WILL HEAR FROM MOVING PARTY FIRST.

MR. HAMRICK: YES, YOUR HONOR.

I HAVE READ THE COURT'S TENTATIVE, AND IT SEEMS THAT THE COURT IS CONVINCED OR DECIDED THAT THE FRAUD ISSUE IS NOT GOING TO BE A STUMBLING BLOCK TO THE MOTION.

THE COURT: WE SHOULDN'T WASTE ANY TIME ON THAT.

MR. HAMRICK: MOVING TO THE KEY ISSUES, I THINK THE

* * *

[21] ARGUMENT ON YOUR OBJECTIONS, FEEL FREE.

MR. COATE: WELL, YOUR HONOR, IT'S CLEAR THAT THERE IS NO CONTRACTUAL PRIVITY BETWEEN SPECIALLY APPEARING DEFENDANTS AND THE PLAINTIFFS IN THIS CASE. IT'S ALSO CLEAR FROM THE DECLARATION OF MS. CARPENTER THAT THE BANK REQUIRED SPE'S TO BE SET UP FOR EACH OF THESE FILMS. THIS IS NOT A FRAUDULENT INCORPORATION IN THE INCEPTION WHICH IS TYPICALLY WHAT PEOPLE CITE TO WHEN TRYING TO APPLY THE ALTER EGO DOCTRINE.

THESE CORPORATIONS WERE SET UP AS SINGLE-PURPOSE ENTITIES BECAUSE THE BANK REQUIRED THAT IN ORDER TO EFFECT THE LOANS. AND THIS IS DONE FOR A NUMBER OF REASONS.

ONE, YOU WANT TO HAVE AN ENTITY THAT CONTROLS THE RIGHTS TO THE FILM AND MAKES IT EASY TO CONVEY, MAKES IT EASY FOR THE BANK TO SET UP ACCOUNTS ON A PER-FILM BASIS, AND ALSO IN THE EVENT OF A SHORTFALL TO FORECLOSE ON THAT PARTY'S FILMS. THE BANK HAS NOT TAKEN THOSE STEPS. THEY HAVE FORECLOSURE RIGHTS ON THESE FILMS. THEY HAVEN'T AVAILED THEMSELVES OF IT. THAT'S A DIFFERENT ISSUE.

SO IF THE BANK IS REQUIRING IT, HOW CAN THEY TURN AROUND AND THEN ARGUE WHY THIS WAS FRAUD IN THE INCEPTION? THESE COMPANIES, THEY WERE UNDER CAPITALIZED. THEY SET OUT FROM THE START TO STEAL OUR MONEY. IT'S CLEARLY NOT THE CASE. IT'S JUST THE WAY

BUSINESS IS DONE IN THIS INDUSTRY. THEY DO IT ON ALL THEIR LOANS. THAT IS JUST STANDARD OPERATING PROCEDURE. THERE IS NO FRAUD IN SETTING UP SINGLE-PURPOSE ENTITIES TO PRODUCE MOTION PICTURES.

THERE IS ALSO NO QUESTION HERE, YOUR HONOR, THESE WERE FOREIGN FILMS. THESE ARE CANADIAN OR CANADIAN U.K. [22] CO-PRODUCTIONS. THEY WERE PRODUCED IN CANADA OR THEY WERE PRODUCED IN CANADA AND THE UNITED KINGDOM, OTHER COUNTRIES. THEY WERE MADE BY CANADIANS PRIMARILY. THIS IS – THIS CASE HERE THERE WAS A LOT OF TRANSACTING GOING ON OUTSIDE OF THE UNITED STATES. YES, LOANS WERE MADE, BUT THEY WERE ONLY PART OF THE LOANS MADE FOR THESE PICTURES IN MANY CASES.

SO AS FAR AS APPLYING THE ALTER EGO DOCTRINE, WE CITED THE *SONORA MINING* CASE. IN THAT CASE IT'S NOT ENOUGH SIMPLY TO ALLEGE AN ALTER EGO RELATIONSHIP. YOU'VE GOT TO COME FORWARD WITH EVIDENCE, AND THE BURDEN OF PROOF IS ON THEM. THE DECLARATIONS ARE REPLETE WITH HEARSAY.

THE TWO DISTRIBUTORS AMONG – I GUESS THERE ARE FOUR-INCH BINDERS THAT THEY DIDN'T COME FORWARD WITH, WITH ALL OF THIS SO-CALLED STATEMENTS THEY ARE RELYING ON THAT SAY, "IT APPEARS IT'S NOT MY SIGNATURE." NO ONE IS SAYING, "I KNOW GARY HOWSAM FORGED THIS DOCUMENT. I KNOW GREENLIGHT FILM AND TELEVISION, INC. PROVIDED THIS DOCUMENT."

THERE IS NO CAUSAL LINK IN THOSE DECLARATIONS BETWEEN THESE DEFENDANTS WHO HAVE NO CONTRACTUAL PRIVITY WHO ARE CANADIAN NATIONALS OR A CANADIAN CORPORATION, NO PRIVITY WITH THE DEFENDANTS, AND IT'S THEIR BURDEN TO COME FORWARD WITH THAT. THE *SONORA MINING* CASE IS CLEAR YOU CAN'T JUST ALLEGE IT.

SIMILARLY, THERE IS NO EVIDENCE OF FRAUD BY THESE DEFENDANTS. AS MR. KILKOWSKI POINTED OUT, WHAT IS BEFORE THE COURT ARE FACTS AND CIRCUMSTANCES INDICATING THAT A SALES AGENT MIGHT HAVE PROVIDED, THESE DOCUMENTS. WE DON'T KNOW. BUT THERE IS NOTHING IN THESE DECLARATIONS THAT INDICATES MY CLIENTS IN ANY WAY PARTICIPATED IN IT.

[23] NOW, THIS ALSO LEADS US TO ANOTHER ISSUE, YOUR HONOR. I MEAN, AT THIS POINT WE ARE STILL CONTESTING JURISDICTION AND I UNDERSTAND YOUR HONOR'S TENTATIVE, AND WHETHER OR NOT YOU WAIVER FROM THAT TENTATIVE WE WILL, OF COURSE, ADDRESS IT. BUT THE PLAINTIFF'S FIRM BEFORE THIS CASE WAS FILED WENT TO CANADA, REVIEWED ALL OF MY CLIENT'S FILES, AND THIS WAS DONE BECAUSE THEY SAID, "WE HAVE TO FIND OUT WHAT HAPPENED HERE. WE UNDERSTAND YOU HAVE CLAIMS AGAINST THE SALES AGENT, BUT SO DO WE. SO LET US PROSECUTE THESE CLAIMS ON OUR BEHALF BECAUSE IT WILL REDUCE YOUR INDEBTEDNESS AND HOPEFULLY IT WILL LEAD US TO GETTING PAID."

SO WE COOPERATED WITH THE BANK, WITH THE BANK'S LAWYERS. THESE GENTLEMEN WERE IN MY CLIENT'S OFFICES IN CANADA. THEY FILED ALL – I MEAN, THEY COPIED ALL THE RECORDS IN CANADA THAT WERE PROVIDED VOLUNTARILY UNDER FALSE PRETENSES. I BELIEVE AT THAT TIME THEY THOUGHT THAT THESE LAWYERS WERE ACTING IN THEIR JOINT INTEREST. IT WAS IN THE PRODUCER'S INTEREST TO SEE THAT THESE MONIES WERE REPAID BECAUSE IT WOULD REDUCE THE LOAN INDEBTEDNESS.

SO IF THE CASE GOES FORWARD AND JURISDICTION, THAT ISSUE IS BEHIND US, WE DO ANTICIPATE FILING A MOTION TO RECUSE COUNSEL. I UNDERSTAND TYPICALLY THAT THE COURT WILL LOOK AT THE FORUM NON-CONVENIENCE MOTION AS AN ADJUNCT TO THE JURISDICTIONAL MOTION. BUT, AGAIN, THESE ARE CANADIAN MOVIES. THEY WERE PRODUCED IN CANADA BY CANADIANS. ALL OF THE RECORDS THAT THEY ARE SEEKING ARE IN TORONTO AND/OR BRITISH COLUMBIA. THIS IS REALLY A CANADIAN CASE, YOUR HONOR.

THE COURT: DO YOU HAVE AGREEMENTS FROM ALL THE FOLKS IN [24] THIS CASE THAT THEY WILL BE SUBJECT TO JURISDICTION BY SOMEBODY IN CANADA?

MR. COATE: YES, YOUR HONOR.

THE COURT: IS THAT IN WRITING SOMEWHERE?

MR. COATE: MY UNDERSTANDING, YOUR HONOR, AND I GUESS YOU WILL HAVE TO HEAR

FROM CO-DEFENDANTS, IS THAT WE PREFER IF THE CASE GOES FORWARD TO DO IT IN ARBITRATION TO THE EXTENT THAT THE PARTIES ARE SUBJECT – THE PRINCIPAL PARTIES ARE SUBJECT TO ARBITRATION CLAUSES, AND WE HAVE CONSPIRACY CLAIMS. BUT I DON'T WANT TO SPEAK OUT OF TURN FOR THE OTHER DEFENDANTS.

THE COURT: MY QUESTION IS: HAS EVERYBODY AGREED TO THE JURISDICTION OF SOME CANADIAN PROVINCE OR ENTITY? THE MOTION DOESN'T EVEN TELL ME WHICH CANADIAN PROVINCE THIS SHOULD BE IN AND THEY HAVE VERY DIFFERENT LAWS. THAT IS ONE OF THE OTHER PROBLEMS I'VE GOT WITH THE FORUM NON-MOTION.

NOBODY IS TELLING ME WHAT FORUM WE WOULD USE. I HAVE NO DECLARATIONS FROM ANY CANADIAN COUNSEL THAT KNOW ANYTHING ABOUT THE PROVINCE YOU WOULD USE. THAT IS A PROBLEM FOR ME. I DON'T HAVE ANYTHING FROM ANYBODY SAYING, "WE WILL ALL AGREE TO JURISDICTION ANYWHERE." LET'S LEAVE THAT ISSUE ASIDE. WE ARE NOT GOING TO ADDRESS IT NOW. EVERYBODY HAD TIME TO.

ANYTHING ELSE ON THAT?

MR. COATE: YOUR HONOR, THE ONLY THING THAT I WOULD ADD IS GIVEN THE NATURE OF A JURISDICTIONAL CHALLENGE, IN THE EVENT THE COURT STANDS ON ITS TENTATIVE, WE WOULD REQUEST LEAVE OF COURT UNDER C.C.P. 41810(C) FOR AN ADDITIONAL 20 DAYS TO PROCEED WITH A WRIT WITH THE INTERVENING HOLIDAYS

AND I [25] HAVE VACATION PLANS OVER THE HOLIDAYS AND SO DOES MY CLIENT.

THE COURT: I HEAR YOU. THAT WOULD MAKE SENSE.

MR. COATE: WE WOULD APPRECIATE THAT.

THE COURT: OKAY. PLAINTIFF.

MR. ADDISON: ROBERT ADDISON.

YOUR HONOR, GARY HOWSAM CAME TO CALIFORNIA SEEKING LOANS TO PRODUCE FILMS FOR HIS PRODUCTION COMPANY GREENLIGHT FILM AND TELEVISION, AND HE SOUGHT OUT A CALIFORNIA BANK, COMERICA BANK, AND OBTAINED LOANS FROM THAT BANK. HE WAS HERE PERSONALLY. HE SIGNED THE LOAN DOCUMENTS.

MR. HOWSAM'S COUNSEL HAS ACCURATELY STATED THAT THE FORMATION OF THESE SPE'S WAS STANDARD OPERATING PROCEDURE. IT'S BASICALLY AN ACKNOWLEDGMENT THAT IT'S A FORMALITY. IT'S PAPERWORK TO MAINTAIN THE EASE OF DOCUMENTING THE LOANS, WHO THE MONEY IS GOING TO GO TO, SETTING UP ACCOUNTS, ET CETERA.

I SHOULD ALSO MENTION THAT UNDER THE LOAN DOCUMENTS MOST OF THE FILMS WERE CROSS-COLLATERALIZED WITH EACH OTHER. SO THE LICENSE FEES COMING IN OFF "KEVIN OF THE NORTH" COULD BE APPLIED TO PAY OFF "THE CIRCLE" IF "KEVIN OF THE NORTH" GOT PAID OFF.

SO, YOU KNOW, NEITHER THE BANK NOR THE PRODUCER REALLY ACKNOWLEDGED THE SEPARATENESS OF THE SPE'S. THEY WERE BASICALLY – IT'S GARY HOWSAM, MOVIE PRODUCER, I NEED LOANS TO PRODUCE FILMS. HE IS HERE IN CALIFORNIA OBTAINING THOSE LOANS.

YOUR HONOR, IF WE HAVE TO PROVE OUR ENTIRE FRAUD CASE TO OBTAIN JURISDICTION AS HOWSAM'S COUNSEL SUGGESTS, THEN QUITE SIMPLY WE WOULD NEED MORE TIME AND WE WOULD NEED [26] OPPORTUNITY TO CONDUCT DISCOVERY ON THE ISSUE OF GARY HOWSAM'S FRAUD. THIS IS A HUGE CASE. IT'S NOT SOMETHING THAT COULD BE DONE WITHIN ONE MONTH.

WE HAVE SUBMITTED EVIDENCE OF FRAUD. WE HAVE PAYMENTS GOING TO THE SALES AGENT'S WIFE OUT OF GARY HOWSAM'S COMPANY'S BANK ACCOUNTS. THE EXPLANATION FOR THOSE PAYMENTS HAS BEEN DIFFERENT AT DIFFERENT TIMES, AND THE STORY THAT'S PRESENTED IN THE DECLARATIONS BY SOME TORONTO RESIDENT WHO CLAIMS TO BE SUPERVISING THE PRODUCTION ACCOUNTING, WE DON'T KNOW WHERE SHE IS FROM OR WHAT COMPANY SHE WORKS FOR OR WHAT HER CAPACITY WAS OR WHAT HER AUTHORITY WAS, BUT HER EXPLANATION IS DIFFERENT THAN THE EXPLANATIONS WE OBTAINED FROM HAREL GOLDSTEIN'S WIFE AND FROM GARY HOWSAM HIMSELF WHEN MR. SITTLER AND I WERE IN TORONTO MEETING WITH HIM.

AND ADDRESSING THAT TRIP ALSO, MR. SITTLER AND I DID GO TO CANADA AND DID MEET WITH GARY HOWSAM AND DID REVIEW SOME DOCUMENTS. UNDER THE LOAN AGREEMENTS THE PRODUCER IS OBLIGATED TO OPEN THE PRODUCTION FILES TO THE BANK FOR REVIEW. WE MADE A DEMAND TO LOOK AT THOSE FILES, AND WE WENT UP LOOKING FOR SPECIFIC ITEMS AND WE COPIED SOME OF THOSE FILES.

THE COURT: LET'S NOT TALK ABOUT POTENTIAL CONFLICT NOW.

MR. ADDISON: OKAY. THAT'S ALL, YOUR HONOR. WE FEEL THAT OUR PAPERS EXPLAIN THE ARGUMENT SUFFICIENTLY.

THE COURT: I THINK I WILL TAKE THEM ALL UNDER SUBMISSION. I THINK BASED ON SOME OF THE THINGS YOU FOLKS HAVE SAID TO ME, WE SHOULD PROBABLY CONTINUE THE CMC. I AM GOING TO ASK THAT YOU PEOPLE MEET AND CONFER, AND I WILL ASK PLAINTIFF'S COUNSEL TO INITIATE SUCH A MEET AND CONFER AND SEE

* * *

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

DEPARTMENT 31 HON. ANDRIA K. RICHEY, JUDGE

COMERICA BANK, A MICHIGAN BANKING CORPORATION, PLAINTIFF, VS. GARY HOWSAM, AN INDIVIDUAL, ET AL., DEFENDANTS.	)	SUPERIOR COURT NO. BC316406 REPORTER'S CERTIFICATE

I, INGRID A. LAFRANCHI, OFFICIAL COURT REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING PAGE 1 THROUGH 29, INCLUSIVE, COMPRISE A FULL, TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER ON WEDNESDAY, DECEMBER 15, 2004.

DATED THIS 15TH DAY OF DECEMBER 2004

/s/ Ingrid A. Lafranchi
INGRID A. LAFRANCHI, CSR. NO. 9120
OFFICIAL REPORTER

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

COMERICA BANK, a Michigan Banking Corporation,

Plaintiff,

vs.

GARY HOWSAM, an individual; GFT ENTERTAINMENT, INC., an Ontario corporation, also known as GFTE, INC., and successor to GREENLIGHT FILM AND TELEVISION, INC. D/B/A GFT ENTERTAINMENT, an Ontario Corporation; GFT CIRCLE FILMS, INC., an Ontario Corporation; ROAD RAGE FILMS, INC., a Corporation of unknown origin; JANUS PRODUCTIONS, INC., a Quebec Corporation; GFT GOING BACK FILMS, INC.,

Case No.: BC 316406

[The Honorable Andria K. Richey]

DECLARATION OF GARY HOWSAM IN SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS COMPLAINT FOR LACK OF PERSONAL JURISDICTION AND/OR TO DISMISS OR STAY ACTION ON FORUM NON CONVENIENS GROUNDS

[Complaint filed: June 1, 2004]

Date: November 17, 2004
Time: 8:30 a.m.
Dept.: 31

an Ontario Corporation; GFT/ REDWOOD KOTN FILMS, INC., a British Columbia Corporation; GFT/REDWOOD IGNITION FILMS, INC., a British Columbia Corporation; ADAM BENECKE, an individual; MICHEL GLOCKLER, an individual; and DOES 1 through 100, inclusive, Defendants.	Discovery Cut-off: None Motion Cut-off: None Trial Date: None (Filed Oct. 27, 2004)

I, GARY HOWSAM, hereby declare as follows:

1. I am a named Defendant in this matter and have personal knowledge of all matters stated herein. If called upon to testify to the matters set forth herein, I could and would do so competently. I make this declaration solely in connection with the instant Motions and make no general appearance in this action.

2. I am an individual over 18 years of age and am a citizen of the Province of Ontario, Canada residing in Toronto, Canada. I am also the President of Greenlight Film & Television Inc. ("GFTI") which is a corporation existing under the laws of Ontario, Canada which maintains its principal place of business at 124 Merton Street, Suite 407, Toronto, Ontario M4S 2Z2.

3 GFT is not now or has never been qualified to do business in the State of California.

4. None of GFTI's officers or directors, including myself, reside or are domiciled in the State of California.

5. GFTI has no employees, residing or domiciled in California.

6. GFTI has no branch office or comparable facilities in California, and has no telephone listings or mailing addresses in California.

7. Neither GFTI nor myself maintain any bank accounts or other tangible personal or real property in the State of California.

8. GFTI does not direct any of its advertising specifically toward California residents nor does it advertise in publications that are directed primarily toward California residents.

9. No meetings of GFTI's board of directors or shareholders have been held in California; none of its officers or directors have attended business conferences in such capacities within the State of California.

10. At no time have I individually or GFTI ever entered into a written agreement with Plaintiff. Nor have I individually ever entered into a written agreement with Plaintiff.

11. Further, it would be unreasonable to require Defendants GFTI and myself to defend this action in courts within California for the following reasons:

a. It would be unduly burdensome to require me to defend this action in the State of California as neither GFTI or myself have undertaken steps to purposefully avail ourselves of the jurisdiction of the State of California;

b. A proper alternative forum for this dispute readily exists in Ontario, Canada;

c. Ontario, Canada will be the most efficient forum to resolve this dispute as witnesses concerning the alleged obligations to Plaintiff are within the jurisdiction of Ontario, Canada; and,

d. California has little interest in the dispute involving the alleged non-payment of film distribution obligations between a Michigan Plaintiff and other Canadian Defendants.

12. The following are names and addresses of all person known to be percipient witnesses to any of the matters raised in the pleadings in this action and the matters upon which they are expected to testify:

a. I reside in Toronto, Ontario, Canada and will testify to the matters set forth herein on my own behalf on behalf of GFTI;

b. Greenlight Film & Television Inc. is a Toronto, Ontario, Canada Corporation and it expected to testify to the matters to which it is a percipient witness;

c. Plaintiff is a Corporation existing under the laws of the State of Michigan. It is unknown what Plaintiff will testify to.

13. Further, the interests of justice and the convenience of the parties and witnesses would be served by transferring this action to Ontario, Canada for the following reasons:

a. It would be burdensome and inconvenient for the majority of the witnesses set forth above to attend a trial in California because of the expense of travel away from their business and other pursuits.

b. It would not be possible to subpoena numerous third party Canadian witnesses for trial in California; while they are subject to process in Ontario, Canada to which transfer is sought. Such witnesses might include among others:

1) David Woodfield – Gowling Lafleur Henderson LLP; knowledge of differentiation of Greenlight Film & Television Inc. and Production Company defendants and absence of alter ego relationship.

2) GFT Circle Films Inc. (GFT Heresy Films Inc., Road Rage Films Inc., Janus Productions Inc., GFT Going Back Films Inc., GFT/Redwood KOTN Films Inc., GFT/Redwood Ignition Films Inc., and Carolyn Stamegna – legal formation of Production Company defendants.

3) Dave Bruner – former head of production services at Medallion PFA.

4) Brian White – Technicolor, formerly Medallion PFA.

5) Jane Douglas – Production Accountant, "Global Heresy" and "The Circle".

6) Adeline Elias – production accountant who managed "Going Back" accounts.

7) Tracey Boyd – "Road Rage" line producer.

8) James Mou – "The Circle" line producer.

9) Juliette Hagopian – line producer, "Going Back".

10) Gregor Hutchinson – post production supervisor for "Going Back" and for "Ignition" and for "Kevin of the North" and for "The Circle" and for "Global Heresy".

11) Warren Nimchuk, Price Waterhouse re financing and budget reviews of Production Company Defendants.

12) Jim Sternberg, former president of The Completion Guarantors and current president of Film Finances Canada.

13) John Ross, former Chairman of The Completion Guarantors. Currently Chairman of Film Finances Canada.

14) Zenon Marchowski, former loan officer and account manager of CIBC.

15) Bob Presner, former President of Film Finances Canada.

16) Debbie Mermelstein, former counsel to Film Finances Canada.

17) David Steinberg, attorney at Heenan Blaikie.

18) Claude Forest, Multimedia insurance brokers.

19) Mauro Spagnolo, former VP with CIBC.

20) Oliver Groom, post production and delivery supervisor.

All of the books and records of GFTI and myself are located in Toronto, Ontario, Canada to which transfer is sought.

c. Finally, a transfer will serve the interests of judicial economy; will prevent a waste of time and money; and Ontario, Canada presents a forum with relevant ease of access to proof as well as the availability of compulsory process regarding conduct to have alleged to have occurred in this case.

I declare under penalty of perjury under the laws of the Sate of California in accordance with the laws of the United States that the foregoing is true and correct and that this declaration was executed on the 26 day of October, 2004 at Toronto, Ontario.

/s/ Gary Howsam
GARY HOWSAM

No. 05-229

Supreme Court, U.S.
FILED
SEP 19 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

GARY HOWSAM, a Canadian national and GREENLIGHT FILM & TELEVISION INC., an Ontario, Canada corporation,

Petitioners,

v.

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES,

Respondent,

COMERICA BANK, a Michigan corporation,

Real Party In Interest.

On Petition for A Writ of Certiorari to the Supreme Court of California

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Rules 15.2 and 24.2 of the Rules of the Supreme Court of the United States, Respondent Comerica Bank, a Michigan Banking Corporation ("Comerica"), submits this brief in opposition to the Petition for Writ of Certiorari (the "Petition"), filed by Petitioners Greenlight Film and Television, Inc., d/b/a GFT Entertainment ("Greenlight") and Gary Howsam ("Howsam") (collectively, "Petitioners").

This opposition is submitted solely to bring to this Court's attention certain misstatements in the Petition regarding Petitioners' motion to quash service of summons for lack of personal jurisdiction ("Motion"), and the trial court's proceedings associated therewith. Comerica fully opposes the Petition and hereby respectfully reserves any and all rights to raise additional facts, authorities and arguments in support of its opposition, in the event this Honorable Court requests briefing pursuant to Rule 16.

In summary, Comerica objects to the following misstatements:

- The Petition repeatedly states that the trial court's exercise of personal jurisdiction was "solely" based upon allegations of "imputed conduct" based on the alter ego doctrine. *See, e.g.*, Petition, at pp. 12, 14, 16, 20, 22. This is not true. The trial court expressly based its ruling on Petitioners' own direct contacts with the state. Petition, at App. 6-7.

- Petitioners' Question Presented states that the trial court superseded "integrated contractual arrangements," but does not specify anywhere in the Petition what those "contractual arrangements" are. The only contracts at issue were loan agreements entered into by Howsam and Greenlight's alter egos, in which the parties consent to jurisdiction in California.

- In their Statement of the Case, Petitioners misrepresent the disputed and undisputed facts in the record below. Contrary to Petitioners' assertions, it is actually undisputed that forged documents were submitted to Comerica in connection with the loans at issue.

- In their Statement of the Case, Petitioners also claim that it is undisputed that neither Howsam nor Greenlight submitted forged loan documents to Comerica. This is also untrue. Comerica alleges that Howsam and Greenlight were complicit in submitting false collateral to Comerica; thus, their participation is very much at issue.

II.

STATEMENT OF THE CASE

Despite their extensive and purposeful contacts with California in furtherance of a multi-million dollar fraud scheme aimed at a California bank,[1] Petitioners persist in

[1] Petitioners argue that California does not have a compelling interest in providing a remedy for Comerica in this case on account of its Michigan citizenship. This is misleading and untrue. First, during

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their attempt to evade the California trial court's proper exercise of specific jurisdiction over them. It is undisputed that the trial court applied the proper minimum contacts analysis, as set forth by this Court in *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945). Following *International Shoe* and its progeny, the trial court held that the exercise of personal jurisdiction over Petitioners under California's long arm statute was constitutional in this case. Cal. Code Civ. Proc., § 410.10. Accordingly, even if this Court were to con-clude that it would have ruled differently, the Petition should be denied. Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

A. Procedural Background.

On December 15, 2004, the trial court denied Petitioners' Motion. The minute order does not specify if the trial court relied on one or more bases to reach its ruling [Petition, at App. 6-7]; nor does the transcript of the proceeding on the Motion contain any discussion on the matter. Petition, at App. 81-107. Rather, the trial court's minute order states that Petitioners had "sufficient contacts to exercise at least 'specific jurisdiction' over these defendants." Petition, at App. 6-7.

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the relevant time period, Comerica Entertainment Group, the division that was the victim of Petitioners' fraud, was part of Comerica Bank California, a California banking corporation and a subsidiary of Comerica Bank. More importantly, regardless of its place of incorporation, Comerica Bank has a significant portion of its operations in California, including the presence of the entire Comerica Entertainment Group. Moreover, this action arises out of fraud committed by Petitioners against Comerica in California, and all of Comerica's officers who are witnesses in the case are in California.

B. Petitioners Committed Fraud in California.

In 1999 and 2000, Howsam came to California numerous times to negotiate financing with Comerica for a number of films he planned to produce through his company, Greenlight ("Films"). App. at p. 100: Declaration of Raymond F. Gross ("Gross Decl."), ¶3. During negotiations for the loans, which occurred in Los Angeles between Howsam and Comerica personnel, Howsam presented himself as a movie producer seeking financing for the Films. App. at p. 88: Declaration of Carmen E. Carpenter ("Carpenter Decl."), ¶5. The resulting loans, amounting to over $37 million, were negotiated by Howsam *in California*, and were funded through single purpose entities ("SPEs"), which were established by Howsam and Greenlight, to facilitate the funding of the loans. App. at pp. 89-93: Carpenter Decl., ¶¶8-10.

Consistent with normal business practices in the independent film industry, Comerica required Howsam to pre-sell certain territories and memorialize these pre-sold territories in license agreements, which would provide collateral for the bank's loans. *Id.* As a condition of making each loan, Comerica required assignments of the SPEs' right to receive license fees from various foreign film distributors. App. at pp. 94-95: Carpenter Decl., ¶14. These assignments, on which Comerica relied to make a loan to each of the SPEs, were (or were to have been) memorialized in a contract between the SPEs, Comerica and the distributor. This contract was entitled "Notice and Acknowledgment of Assignment" ("NOA"). *Id.*

Although the SPEs were the nominal borrowers on the Comerica loans, Comerica only provided funding to the

SPEs based on the collateral provided by Howsam and Greenlight in the form of the NOAs. App. at pp. 94-95: Carpenter Decl., ¶¶14-15. Many of these documents were later discovered to be falsified. *Id.* As part of its investigation into the matter, Comerica obtained and submitted to the trial court declarations by foreign distributors, in which the distributors testify that their signatures were forged on NOAs and other license agreements. App. at pp. 79-84: Declaration of Robert S. Addison, Jr. ("Addison Decl."), Exs. N, O. Petitioners' evidentiary objections to these declarations were overruled and no contrary evidence was submitted. Petition, at App. 8. Thus, this evidence is undisputed.

Comerica introduced evidence below that the falsification of the collateral, on which Comerica relied in making millions of dollars in loans, was orchestrated by Petitioners in California and was clearly directed at a California corporation. App. at pp. 49-52. Thus, the trial court could have and did find that Petitioners' direct contact with California was related to the underlying fraud and, on that basis, was sufficient to justify the exercise of personal jurisdiction over Petitioners. Petition, at App. 6-7.

C. Comerica's Borrowers (the SPEs) Are Howsam and Greenlight's Alter Ego Corporations, and Consented to Jurisdiction and Venue in Los Angeles, California.

Consistent with its normal business practices, Comerica required Howsam and Greenlight to create the SPEs as shell corporations for each film, which entities then became the borrowers for each of the subject loans. App. at pp. 89-93: Carpenter Decl., ¶¶8-10. Howsam

signed of all the loan documents on behalf of the SPEs, including the Loan and Security Agreements ("LSAs"), which provide that the parties consent to the application of California law, to jurisdiction in California, and to venue in the Los Angeles County Superior Court. App. at pp. 100-101: Gross Decl., ¶¶3-4; App. at pp. 86-89: Carpenter Decl., ¶¶1-4 and 7.

In the trial court, Comerica submitted evidence to show that the SPEs were Petitioners' alter egos. In all instances the SPEs were owned by Greenlight, or by another corporate entity of which Howsam was the owner and/or officer. App. at pp. 90-91: Carpenter Decl., ¶9. Moreover, the SPEs were virtually non-capitalized: for example, GFT Heresy (the SPE for the film *Heresy*) issued a total of ten shares, which were purchased by Greenlight for ten cents per share, for a total of $1; GFT-KOTN and GFT-Ignition (two other SPEs) each issued 101 shares at ten cents per share and, in both cases, 100 of the shares were purchased by Greenlight (49 shares) and Redwood Films, Inc. (51 shares), both of which are Howsam controlled entities. *Id.*

Although the SPEs signed loan documents subjecting them to jurisdiction and venue in Los Angeles, Comerica argued that the SPEs were alter egos of Howsam and Greenlight because they were undercapitalized, established and owned by Petitioners, and used for a fraudulent purpose. App. at pp. 63-67. Though the trial court did not expressly rule on the issue, there was sufficient evidence for the trial court below to adopt Comerica's argument that Petitioners consented to jurisdiction in California.

III.

ARGUMENT

A. The Petition Contains Misstatements of Fact.

Pursuant to Rule 15.2, Comerica submits the following clarifications with respect to the misstatements of fact contained in Petitioners' brief, which are pertinent to this Court's understanding of the case:

1. In their Question Presented, Petitioners state that the trial court's exercise of personal jurisdiction was "solely" based upon allegations of imputed conduct. Petition, at p. i. The trial court's ruling contains no such language limiting its basis for exercising jurisdiction. Petition, at App. 6-7. In its First Amended Complaint ("Complaint"), Comerica alleged direct participation by Petitioners in the scheme to defraud Comerica, and the record contains evidence that Petitioners had direct contact with California related to the loans in question. App. at pp. 1, 49-50. Howsam came to California to negotiate the loans with Comerica. App. at p. 87. The trial court properly ruled that Petitioners had direct contact with California, which contact was related to obtaining the loans at issue in this action. This direct conduct was the basis for the trial court's ruling.

2. Petitioners' Question Presented also states that the trial court superseded "integrated contractual arrangements that did not provide for jurisdiction" in California. Petition, at p. i. It is unclear what "contractual arrangements" are referred to because Petitioners did not enter into any contracts with Comerica. The SPEs, however, did execute loan documents which provided for jurisdiction and venue in California. App. at p. 51. Thus, the statement is misleading.

3. In their Statement of the Case, paragraph 1 ("Real Party in Interest"), Petitioners discuss the presence of Comerica's affiliated corporate entities in Canada. Petition, at pp. 1-2. This evidence, even if accurate, was not before the trial court and is totally irrelevant to this Court's review of the Petition.

4. At paragraph 4 of their Statement of the Case ("Comerica's Allegations of Fraud"), Petitioners present as the issue in this case, "*whether certain minimum guarantee agreements provided from foreign distributors . . . were forged or fraudulent.*" Petition, at p. 9. Petitioners' representation that the forgeries are in question is untrue. The undisputed evidence showed that the distribution agreements were forged. App. at pp. 79-84: Addison Decl., Exs. O, N. The issue is who forged them. (Comerica alleges that Petitioners were complicit in forging the agreements. App. at pp. 6-7.)

5. Also in paragraph 4 of their Statement of the Case, Petitioners state that "*it is undisputed that neither Howsam nor anyone acting on [Greenlight's] behalf actually submitted the allegedly fraudulent foreign distributor minimum guarantee agreements at issue to Comerica Bank.*" Petition, at p. 10. This is untrue.

Comerica alleges in its Complaint that Howsam delivered forged License Agreements and Notices of Assignment of fees (NOAs) to Comerica. App. at p. 11. For example, a License Agreement and NOA were submitted to Comerica, which were purported to have been executed on behalf of Rapi Films by Sunny Samtani, a Rapi Production Executive, in September 2000. App. at p. 75. Mr. Samtani declared under penalty of perjury that he never signed either of the documents and that his signature was forged.

App. at pp. 79-82. Petitioners' objections to the Samtani Declaration were overruled and no contrary evidence was introduced. Petition, at App. 8.

In addition, other collateral documents were submitted to Comerica in which Mesrich Holdings Limited ("Mesrich"), purportedly agreed to purchase the right to exploit the film *Ignition* in Italy, in exchange for a payment of $450,000. App. at p. 75. Comerica submitted the declaration of Mesrich's directors, Andres Sanchez and Mirian Rivera, stating under penalty of perjury that no Mesrich director or officer ever signed either of the documents and that the purported signatures were forged. App. at pp. 82-84. Petitioners' objections to the Mesrich Declaration were overruled and no contrary evidence was introduced. Petition, at App. 8.

Comerica alleges that the forged Rapi and Mesrich documents were submitted by Howsam or by someone acting on his behalf. App. at pp. 11-12. If, as Comerica alleges, Petitioners were responsible for submitting the falsified collateral, then this would further evidence direct conduct aimed at California. The matter of who submitted forged collateral to Comerica is very much in dispute, therefore, and, in fact, is a crucial issue in the case.

6. Petitioners' paragraph summarizing the Proceedings in the California Courts misrepresents the trial court's December 15, 2004, ruling denying Petitioners' Motion. Petitioners assert that the trial court found specific jurisdiction "*based upon imputed conduct under an alter ego theory.*" Petition, at p. 11. The trial court's minute order, to which Petitioners cite, does not actually address the question of whether the SPE defendants were alter